



## Well-Intentioned but Counterproductive: An Analysis of the NFLPA’s Financial Advisor Registration Program\*

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### ABSTRACT

In an October 17, 2019 story for *The Athletic*, Alicia Jessop and Daniel Kaplan reported that the National Football League Players Association (“NFLPA”) was, for the first time, registering institutions in its Financial Advisor Registration Program (“Registration Program”).<sup>1</sup> This announcement represented the latest in a series of changes<sup>2</sup> to the Registration Program since its launch in 2002.<sup>3</sup>

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\* An earlier draft of this Article won a 2020 Paul C. Weiler Writing Prize at Harvard Law School. Any errors or oversights are the author’s.

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The author thanks: *Sarah Edwards* and *Sameer Aggarwal* for their shared commitment to making JSEL Volume 11 a success, their incisive editing, and their friendship throughout law school; *Ryan Gribbin-Burket* for his indefatigable commitment and all-around excellence as this Article’s Senior Article Editor; *Alex Blutman*, *Becky Hval*, and *Eli Nachmany* for their superb and outsized editing contributions; *Ali Nayfeh*, *John Ellis*, *Jonathan Kuang*, *Kimberly Everett*, and *Larson Ishii* for their conscientiousness and diligence as editors; and *Professor Peter Carfagna* for his continued support and mentorship.

<sup>1</sup> See Alicia Jessop & Daniel Kaplan, *NFLPA brings Goldman Sachs into fold to aid players as part of work stoppage planning*, *ATHLETIC* (Oct. 17, 2019), <https://theathletic.com/1296300/2019/10/17/nflpa-brings-goldman-sachs-into-fold-to-aid-players-as-part-of-work-stoppage-planning/> [<https://perma.cc/UZD9-LBAY>].

<sup>2</sup> See *infra* Section I.B.

<sup>3</sup> See Christopher R. Deubert, I. Glenn Cohen & Holly Fernandez Lynch, *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations*, 7 *HARV. J. SPORTS & ENT. L.* (SPECIAL ISSUE) 1, 267 (2016) (“[T]he

This Article seeks to evaluate the Registration Program comprehensively. Part I outlines the Registration Program, detailing its origins and examining its evolution over its eighteen-year history. Part II offers a critical analysis of the Registration Program. More specifically, it argues that the Registration Program has failed to protect players in three main ways: first, by giving players a misleading sense of trust (which can ultimately facilitate players' exploitation); second, by potentially damaging—rather than improving—players' likelihood of retaining an ethical, qualified financial advisor; and third, by failing to ensure that players victimized by Registration Program financial advisors ("Registered Advisors") can recover their losses. Part III recounts the Article's main points, concluding that the Registration Program—though well-intentioned—is ultimately counterproductive.

## I. THE ORIGINS AND EVOLUTION OF THE REGISTRATION PROGRAM

### A. *Origins of the Registration Program*

In its February 11, 2002 investigative cover story, *U.S. News & World Report* analyzed more than twenty investment schemes that caused catastrophic losses for National Football League ("NFL") players including Fred Taylor (\$3.6 million lost), Robert Brooks (\$2.5 million lost), Simeon Rice (\$2.4 million lost), Eric Dickerson (\$1.8 million lost), Antoine Winfield (\$1.35 million lost), and Ike Hilliard (\$1.1 million lost).<sup>4</sup> While perhaps shocking to some, this story could not have surprised the NFLPA, as the union had recently reached similar conclusions in its own in-depth investigation, finding that seventy-eight NFL players suffered at least \$42 million in fraud-related losses from 1999 to 2002.<sup>5</sup> Even worse, then-NFLPA Executive Director Gene Upshaw believed that \$42 million in losses represented only "the tip of the iceberg" because players were often "too embarrassed to report" losses from fraud.<sup>6</sup>

To protect players from similar fraud and exploitation in the future, the NFLPA launched its Financial Advisor Registration Program in 2002,

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NFLPA began a system of regulating financial advisors in 2002. That year, the NFLPA launched a program whereby financial advisors could register with the NFLPA and released its Regulations and Code of Conduct Governing Registered Player Financial Advisors . . . ." (endnotes omitted)).

<sup>4</sup> See Edward T. Pound & Douglas Pasternak, *Money Players*, U.S. NEWS & WORLD REP., Feb. 11, 2002, at 30.

<sup>5</sup> See *id.*

<sup>6</sup> *Id.*

becoming (and remaining) the only major sports union to regulate players' financial advisors.<sup>7</sup>

### 1. Agent Certification Versus Financial Advisor Registration

The creation of the Registration Program was not the first time the NFLPA spearheaded an initiative to regulate those offering professional services to its player-members: in 1983, the NFLPA implemented an agent-certification process ("Certification Program"), becoming the first major sports union to regulate players' contract-negotiation agents ("Certified Agents").<sup>8</sup> Other major sports unions—the Major League Baseball Players Association, the National Basketball Players Association, and the National Hockey League Players Association—soon followed suit and today maintain their own certification programs.<sup>9</sup> Similarly, in 1999, the NFLPA became the first union to mandate that its current and prospective Certified Agents pass a written examination to maintain Certification Program eligibility.<sup>10</sup>

Both these examples, however, represent regulations imposed on players' *agents*. Because the NFLPA's Registration Program regulates players' *financial advisors*—not agents—it differs from the Certification Program in at least two important respects. First, the "NFLPA has the legal authority to certify, regulate and discipline"<sup>11</sup> Certified Agents—unlike financial advisors—because it "is the exclusive collective bargaining representative of

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<sup>7</sup> See Deubert, Cohen & Fernandez, *supra* note 3, at 267. ("[T]he NFLPA began a system of regulating financial advisors in 2002. That year, the NFLPA launched a program whereby financial advisors could register with the NFLPA and released its Regulations and Code of Conduct Governing Registered Player Financial Advisors . . . . The NFLPA's financial advisor program was, and remains, the only one of its kind among the major American sports unions . . . ." (endnotes omitted)).

<sup>8</sup> See *id.* at 243 ("The NFLPA has been certifying contract advisors [i.e., agents] in at least some fashion since 1983."); Lori J. Lefferts, *The NFL Players Association's Agent Certification Plan: Is It Exempt from Antitrust Review?*, 26 ARIZ. L. REV. 699, 699–700 (1984) ("The NFLPA was the first sports union to impose a formal method of regulating the conduct of agents representing its players.").

<sup>9</sup> See ROBERT H. RUXIN, *AN ATHLETE'S GUIDE TO AGENTS* 108–109 (5th ed. 2010).

<sup>10</sup> See *id.* at 110 ("The NFLPA was the first union to require both entering and active agents to pass a written exam."); DOYCE J. COTTON & JOHN T. WOLOHAN, *LAW FOR RECREATION AND SPORT MANAGERS* 660 (3d ed. 2003) ("In 1999 . . . the NFLPA started testing anyone who registers to become an NFL player's agent . . . . The NFLPA also requires current agents to take that same test every year . . . .").

<sup>11</sup> Deubert, Cohen & Fernandez, *supra* note 3, at 267.

NFL players pursuant to Section 9(a) of the National Labor Relations Act<sup>12</sup> and therefore “may delegate some of its exclusive representational authority.”<sup>13</sup> By contrast, the NFLPA lacks the legal authority to regulate financial advisors. As explained in a Harvard University report:

Neither the NLRA nor any other law confers any status on the NFLPA that gives it the right to regulate financial advisors. More specifically, financial advisors are not involved in the labor dynamics that create the NFLPA’s legal authority over contract advisors, *i.e.*, financial advisors do not negotiate contracts and generally have no contact with the NFL or NFL clubs.<sup>14</sup>

Because the NFLPA lacks the legal authority to regulate financial advisors, its Registration Program—unlike its Certification Program—must operate on a voluntary basis.<sup>15</sup> This means that, unlike non-Certified agents, non-Registered financial advisors can still work with players, and players can freely retain a non-Registered financial advisor.<sup>16</sup>

Second, the Registration Program, by regulating financial advisors, maintains much closer proximity to, and potentially raises more issues with, securities law than the Certification Program. As explored more fully below, the Registration Program’s adjacency to securities law presented a significant enough legal concern that the NFLPA contacted the Securities and Exchange Commission (“SEC”) a month before launching the Registration Program to request a “No-Action Letter” confirming that operating the Registration Program would neither expose the union to regulation under

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<sup>12</sup> *Black v. Nat’l Football League Players Ass’n*, 87 F. Supp. 2d 1, 2 (D.D.C. 2000).

<sup>13</sup> *Collins v. Nat’l Basketball Players Ass’n*, 850 F. Supp. 1468, 1475 (D. Colo. 1991), *aff’d*, 976 F.2d 740 (10th Cir. 1992).

<sup>14</sup> Deubert, Cohen & Fernandez, *supra* note 3, at 267.

<sup>15</sup> Indeed, unlike the NFLPA’s regulation of agents—which is protected from antitrust scrutiny by a statutory labor law exemption—if the NFLPA attempted a non-voluntary regulation of financial advisors, it would almost certainly be found to violate the Sherman Antitrust Act. *See, e.g., Collins*, 850 F. Supp. 1468 at 1475 (finding that if not for Sherman Act exemption, “then all collective bargaining by labor unions would be a violation of the antitrust laws, because in all collective bargaining other potential bargaining agents are entirely excluded from the relevant market. As the exclusive representative for all of the NBA players, the NBPA is legally entitled to forbid any other person or organization from negotiating for its members. Its right to exclude all others is central to the federal labor policy embodied in the NLRA.”).

<sup>16</sup> *See* Deubert, Cohen & Fernandez, *supra* note 3, at 268 (“[W]hile contract advisors [*i.e.*, agents] are *required* to be certified by the NFLPA to perform their duties, financial advisors are under no obligation to register with the NFLPA.”).

the Investment Advisers Act of 1940 nor lead the SEC to take enforcement action against the NFLPA or participating financial advisors.<sup>17</sup>

## 2. The NFLPA's Request to the SEC for a No-Action Letter

### *a. Overview of the Planned Registration Program*

The NFLPA detailed relevant facts and background information about its plans for the Registration Program in its January 2002 request to the SEC for a No-Action Letter, offering preliminary insight into the Registration Program's fundamental tenets and policies:

- **the impetus for the Registration Program:** a "history of [NFL] players being systemically defrauded," including seventy-eight players losing \$42 million from fraud over "the past three years alone";<sup>18</sup>
- **the goal of the Registration Program:** "to protect former, current and prospective NFL players . . . from fraud by certain 'financial advisers';"<sup>19</sup>
- **how the Registration Program plans to achieve its goal:** by providing players with a "continuously updated"<sup>20</sup> list of NFLPA-Registered Financial Advisors, featuring "both individuals and companies"<sup>21</sup> whom the NFLPA (i) has "pre-screen[ed] . . . as to their character, reputation and integrity"<sup>22</sup> (among other minimum qualifications) and (ii) will continue to monitor to ensure ongoing compliance with the Registration Program;<sup>23</sup>
- **the process for becoming a Registered Advisor:** any applicant may become a Registered Advisor if he or she (i) meets the Registration Program's "published . . . 'eligibility requirements,'"<sup>24</sup> (ii) pledges "to comply with the [Registration] Program's published"

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<sup>17</sup> See National Football League Players Association, SEC No-Action Letter, 2002 WL 100675 (Jan. 25, 2002) [hereinafter SEC No-Action Letter to NFLPA]; see also *infra* Section I.A.2.

<sup>18</sup> SEC No-Action Letter to NFLPA, *supra* note 17, at \*8.

<sup>19</sup> *Id.* at \*1.

<sup>20</sup> *Id.* at \*3.

<sup>21</sup> *Id.* at \*1.

<sup>22</sup> *Id.* at \*25.

<sup>23</sup> See *id.* at \*2.

<sup>24</sup> *Id.*

rules for Registered Advisors,<sup>25</sup> and (iii) pays a \$1,000 initial application fee and \$500 first-year annual fee;<sup>26</sup>

- **the Registration Program’s eligibility requirements:** among other things, a bachelor’s degree, designated professional licensing, at least three years of relevant professional experience, and a record clear of disqualifying conduct (for example, fraud-related crimes, fraud-related civil judgments, felonies within the past decade, regulatory discipline, or insolvency within the past seven years);<sup>27</sup>
- **the Registration Program’s rules for Registered Advisors:** among other things, complying with relevant regulations, laws, licensing rules, and the Registration Program’s disciplinary processes; maintaining sufficient professional liability insurance or fidelity bonding; informing “the NFLPA of any change in professional status”; and continuing to “compl[y] with fiduciary standards.”<sup>28</sup>

*b. The Legal Issues on Which the NFLPA Sought SEC Guidance*

After detailing its vision and plans for the Registration Program, the NFLPA dove deeper into the legal issues in its No-Action Letter request, seeking guidance from the SEC on two issues relating to the Registration Program and the Advisers Act.<sup>29</sup>

First, the NFLPA requested that the reviewing SEC staff member “concur with [the NFLPA’s] view that the NFLPA would not be an investment adviser as defined in Section 202(a)(11) of the [Advisers] Act as a result of its operation of the [Registration] Program.”<sup>30</sup> Under 202(a)(11) of the Advisers Act, one is an investment adviser if he or she (i) provides securities advice (ii) for compensation and (iii) “is engaged in the business of providing these services.”<sup>31</sup> In response, the SEC staff member focused her analysis on the first prong of the three-part test: whether the NFLPA would be providing securities advice by operating the Registration Program.<sup>32</sup> In previous guidance, the SEC had interpreted this first prong broadly, stating that “a person providing advice to another person as to the selection or

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<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at \*12.

<sup>27</sup> *See id.* at \*9–\*12.

<sup>28</sup> *See id.* at \*2.

<sup>29</sup> *See id.* at \*23.

<sup>30</sup> *Id.* at \*8.

<sup>31</sup> *See id.* at \*5.

<sup>32</sup> *See id.* at \*4–\*6.

retention of an investment adviser or advisers, under certain circumstances, *would* be deemed to be ‘advising’ others within the meaning of section 202(a)(11).”<sup>33</sup> And here, the SEC staff member observed that NFLPA would be doing exactly that through its proposed Registration Program:

{G}iv[ing] advice to players concerning the selection or retention of an investment adviser . . . because the NFLPA will be implicitly recommending that players use [Registered Advisors] . . . rather than [non-Registered financial advisors] . . . and will be implicitly suggesting that players not use [Registered Advisors] who have been disciplined under the Program.<sup>34</sup>

Yet the SEC staff member ultimately concluded that “the NFLPA would *not* be ‘advising’ others through the [Registration] Program within the meaning of section 202(a)(11) and, therefore, would *not* be an investment adviser under the [Advisers] Act.”<sup>35</sup> While the staff member based her conclusion “upon all of the facts and representations set forth in [the NFLPA’s] letter,”<sup>36</sup> she stated that it hinged “particularly” on the NFLPA’s representations that the Registration Program, among other things, would *not*:

- “recommend any [Registered Advisor] over any other [Registered Advisor], other than indicating whether a [Registered Advisor] has been subject to disciplinary action for violating Program regulations”;<sup>37</sup>
- use “highly selective” criteria for its eligibility requirements because “highly selective” criteria would be less likely to yield the desired result of “a broad cross-section and large number of [Registered Advisors]”;<sup>38</sup>
- consider a Registration Program applicant’s financial performance;<sup>39</sup>
- regulate a Registered Advisor’s financial performance;<sup>40</sup>
- “advise players as to the merits or shortcomings of any particular [Registered Advisor]”;<sup>41</sup>

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<sup>33</sup> See *id.* at \*5 (emphasis added).

<sup>34</sup> See *id.*

<sup>35</sup> *Id.* (emphasis added).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at \*6.

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *id.*

<sup>41</sup> *Id.*

- prohibit players from retaining non-Registered financial advisors or have any “role in the dealings or transactions between players and [Registered Advisors], except in connection with monitoring . . . compliance with [Registration] Program regulations and disciplining [Registered Advisors] who violate [Registration] Program regulations”;<sup>42</sup>
- “tailor[ ]” its list of Registered Advisors “to particular players” or try “to match particular [Registered Advisors] to particular players”;<sup>43</sup>
- earn profits for the NFLPA or charge non-flat registration fees;<sup>44</sup> or
- receive applications from anyone who is “affiliated in any way” with the NFLPA.<sup>45</sup>

Receiving this concurrence from the SEC was critical. If the SEC had not concurred, then the NFLPA could have faced SEC regulation (and future liability, potentially) by operating the Registration Program, perhaps damaging the Registration Program’s economic feasibility.

Second, the NFLPA requested that the reviewing SEC staff member:

[C]onfirm that [the staff] would not recommend enforcement action to the Commission under Section 206(4) of the [Advisers] Act and Rule 206(4)-3 thereunder against the NFLPA and investment advisers participating in the [Registration] Program if those investment advisers make cash payments to the NFLPA and do not treat the NFLPA as a solicitor for purposes of Rule 206(4)-3.<sup>46</sup>

In other words, the NFLPA sought assurance that an investment adviser could pay Registration Program fees to the NFLPA without either party facing SEC enforcement for violating any of the myriad requirements of Rule 206(4)-3.

In the end, even though “[p]roviding a pre-screened list of [Registered Advisors] to players could be viewed as referring clients and prospective clients,”<sup>47</sup> the SEC staff member concluded that it:

[W]ould not recommend enforcement action . . . under section 206(4) . . . and rule 206(4)-3 . . . against the NFLPA and investment advisers participating in the [Registration] Program if those investment

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<sup>42</sup> See *id.*

<sup>43</sup> *Id.*

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> *Id.* at \*8.

<sup>47</sup> *Id.* at \*7.

advisers make cash payments to the NFLPA as described in your letter and do not treat the NFLPA as a solicitor for purposes of rule 206(4)-3.<sup>48</sup>

In her analysis, the SEC staff member cited the NFLPA's "particular" representations that:

- "the [Registration] Program is designed to help players locate investment advisers, rather than serving as a means of soliciting clients for specific investment advisers";<sup>49</sup>
- players would be "provided with a list of pre-screened investment advisers to choose from, rather than . . . steered toward any one investment adviser";<sup>50</sup> and
- "fees paid by the investment advisers to the [Registration] Program are flat fees and are not related to the number of referrals to or clients obtained by the investment adviser, and that such fees are disclosed to the players."<sup>51</sup>

Receiving a concurrence from the SEC on this issue was also pivotal for the NFLPA. Without it, the NFLPA could not have charged a Registration Program fee to investment advisers—which the NFLPA had planned to do to offset the Registration Program's operational costs<sup>52</sup>—without potentially subjecting itself and participating investment advisers to either the costs of compliance with Rule 206(4)-3's extensive requirements or the risk of SEC enforcement. Either of those outcomes could have changed the NFLPA's calculus around the Registration Program's viability.

### *c. Implications for the NFLPA and Its Registration Program*

By addressing these two issues, the SEC's No-Action Letter essentially greenlit the Registration Program, which the NFLPA then launched later in

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *See id.* at \*12 ("The applicant (or the applicant's firm) must pay the NFLPA the required application and annual fees as established from time to time by the NFLPA. The initial application fee shall be \$1,000 and the annual fee for the first year shall be \$500 per individual applicant. A financial advisor will pay an additional annual fee after the first year. An additional fee may be charged to an applicant who the NFLPA determines requires further investigation prior to acceptance in, or once admitted to, the Program. *All the fees collected by the NFLPA will be used exclusively to defray the costs of the non-profit Financial Advisors Program.*" (emphasis added)).

2002.<sup>53</sup> Yet the SEC staff member significantly caveated her favorable response on both issues in the No-Action Letter. Indeed, on the first issue, she stated: “Our position is based upon all of the facts and representations set forth in [the NFLPA’s] letter.”<sup>54</sup> And on the second issue, she stated:

Because [our] position is based on all of the facts and representations made in your letter, you should note that any different facts or circumstances might require a different conclusion. Further, this position expresses our position only with respect to enforcement action, and does not express any legal conclusion on the issue presented.<sup>55</sup>

The SEC also caveats its No-Action Letters categorically on its website: “SEC staff reserves the right to change the positions reflected in prior no-action letters.”<sup>56</sup> So while the SEC’s No-Action Letter significantly mitigated the securities-law risk facing the Registration Program, it did not altogether eliminate any possibility of future securities law conflict, particularly if the NFLPA were to promulgate Registration Program provisions that differed from those detailed in its No-Action Letter request.<sup>57</sup>

## B. *Evolution of the Registration Program*

### 1. The Registration Program’s Code

Since its 2002 launch, the Registration Program has administered the NFLPA’s Regulations and Code of Conduct Governing Registered Player

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<sup>53</sup> See Deubert, Cohen & Fernandez, *supra* note 3, at 267 (“[T]he NFLPA began a system of regulating financial advisors in 2002. That year, the NFLPA launched a program whereby financial advisors could register with the NFLPA and released its Regulations and Code of Conduct Governing Registered Player Financial Advisors . . . .” (endnotes omitted)).

<sup>54</sup> SEC No-Action Letter to NFLPA, *supra* note 17, at \*5.

<sup>55</sup> *Id.* at \*7.

<sup>56</sup> See *No Action Letters*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/fast-answers/answersnoactionhtm.html> [<https://perma.cc/86BQ-HLHY>].

<sup>57</sup> See Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 BUS. LAW. 1019, 1042 (1986) (“The Commission has repeatedly cautioned that it is not bound by staff no-action letters. As a practical matter, however, the recipient of a favorable no-action response can be fairly certain that the assurance provided by the letter will be treated as binding by the Commission, although the estoppel effect of a no-action letter has not been judicially determined. *This is true, of course, only if the facts and circumstances of the transaction actually implemented are as were represented in the request.* . . . [And] a favorable no-action letter does not insulate the recipient from a private litigant who wishes to argue that the same transaction constitutes a violation of the law.” (emphasis added) (footnotes omitted)).

Financial Advisors (“Code”),<sup>58</sup> which “set[s] forth the [Registration] Program in detail.”<sup>59</sup> And while the NFLPA has amended the Code several times since the Registration Program’s inception,<sup>60</sup> today’s Code remains similar overall to the policies detailed in the No-Action Letter.

*a. Amendments to the Registration Program’s Code*

At some point before June 2008, the NFLPA increased the required relevant work experience for Registered Advisors from three to five years.<sup>61</sup> The union implemented most other major amendments to the Code, however, after 2011.

Indeed, the NFLPA tightened the Registration Program’s Code in 2012 by:

- increasing the minimum relevant work experience for Registered Advisors from five years to eight years;<sup>62</sup>
- mandating Registered Advisors maintain at least \$4 million of professional liability insurance or fidelity bonding;<sup>63</sup>
- requiring Registered Advisors to indemnify the NFLPA if they face a lawsuit from a player-client;<sup>64</sup>
- inflating the fee for first-time Registered Advisors from \$1,500 to \$2,500;<sup>65</sup> and

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<sup>58</sup> See Deubert, Cohen & Fernandez, *supra* note 3, at 267 (“[T]he NFLPA began a system of regulating financial advisors in 2002. That year, the NFLPA launched a program whereby financial advisors could register with the NFLPA and released its Regulations and Code of Conduct Governing Registered Player Financial Advisors . . . .” (endnotes omitted)).

<sup>59</sup> NFLPA, NFLPA REGULATIONS AND CODE OF CONDUCT GOVERNING REGISTERED PLAYER FINANCIAL ADVISORS 3 (Oct. 2017) [hereinafter 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT], <https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/FinancialAdvisors/Final%20Financial%20Advisors%20Regs%20October%2024.pdf> [<https://perma.cc/TD72-ZZVT>].

<sup>60</sup> See Deubert, Cohen & Fernandez, *supra* note 3, at 268 (“The Financial Advisor Regulations have been amended from time to time . . . .”).

<sup>61</sup> See Mike Tierney, *Hedge Fund Manager’s Death Does Not Halt Suit Against N.F.L. and Players Union*, N.Y. TIMES (June 2, 2008), <https://www.nytimes.com/2008/06/02/sports/football/02wright.html> [<https://perma.cc/MH5P-CXA5>] (“The only change in criteria since the program’s inception is that advisers must have five years of experience, above the original minimum of three.”).

<sup>62</sup> See Liz Mullen, *NFLPA reopens adviser program*, SPORTS BUS. J. (Aug. 6, 2012), <https://www.sportsbusinessdaily.com/Journal/Issues/2012/08/06/Labor-and-Agents/NFLPA-advisers.aspx> [<https://perma.cc/W3EW-RA3D>].

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

- tripling the fee for renewing Registered Advisors from \$500 to \$1,500.<sup>66</sup>

Four years later, in 2016, the NFLPA broadened its definition of “Applicants Deemed Unqualified” for the Registration Program by disqualifying any applicant who has “breached the payment/repayment terms of a promissory note, loan agreement or [has] otherwise been in default on any financial instrument or obligation within the last ten years.”<sup>67</sup>

And most recently, in 2017, the NFLPA amended the Registration Program’s Code by:

- requiring new Registration Program applicants to be either a Certified Financial Planner or a Chartered Financial Analyst;<sup>68</sup>
- mandating existing Registered Advisors become either a Certified Financial Planner or a Chartered Financial Analyst by November 1, 2020; and<sup>69</sup>
- establishing that Registered Advisors must maintain *both* professional liability insurance *and* fidelity bonding at minimum levels, determined by a Registered Advisor’s assets under management.<sup>70</sup>

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<sup>66</sup> *See id.*

<sup>67</sup> Compare NFLPA, NFLPA REGULATIONS AND CODE OF CONDUCT GOVERNING REGISTERED PLAYER FINANCIAL ADVISORS 12 (June 2016) [hereinafter 2016 NFLPA REGISTERED ADVISORS CODE OF CONDUCT], <https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/FinancialAdvisors/Regulations%20Revised%206.10.2016.pdf> [https://perma.cc/JC6F-Y5HV] (includes quote above; includes section entitled “Breach of Promissory Note or Default on Financial Instrument”), with NFLPA, NFLPA REGULATIONS AND CODE OF CONDUCT GOVERNING REGISTERED PLAYER FINANCIAL ADVISORS (June 2012) [hereinafter 2012 NFLPA REGISTERED ADVISORS CODE OF CONDUCT], <http://docplayer.net/11110941-As-amended-in-march-of-2012-and-edited-in-june-of-2012.html> [https://perma.cc/Y9QP-B4PJ] (does not include quote above; does not include section entitled “Breach of Promissory Note or Default on Financial Instrument”).

<sup>68</sup> *See* 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 7.

<sup>69</sup> *See id.* Reportedly, the NFLPA asked for SEC approval on this rule change, presumably to avoid violating the SEC’s 2002 No-Action Letter on the Registration Program. *See* Marus DiNitto, *NFL Players Association Cracks Down on “approved” Advisor List*, ADVISORHUB (July 24, 2017), <https://advisorhub.com/nfl-players-association-cracks-approved-advisor-list/> [https://perma.cc/AWK9-DTBE] (“The [NFLPA] board in March proposed a rule that would restrict the list to candidates that have Certified Financial Planner or Chartered Financial Analyst designations, according to Dana Hammonds, senior director of player affairs and development at NFLPA. *The rule is pending approval from the Securities and Exchange Commission.*” (emphasis added)).

<sup>70</sup> *See* 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 8; *see also infra* Table 1; Section I.B.1.b.

*b. Current State of the Code*

Though its provisions have changed over the years, the Code has served the same four main functions since 2002.<sup>71</sup> First, the Code states that participation in the Registration Program is voluntary.<sup>72</sup> As explained in Section I.A.1, unlike non-Certified agents (who are legally precluded from representing players), non-Registered financial advisors can financially advise players, and players can freely hire non-Registered financial advisors.<sup>73</sup> And though the NFLPA prohibits its Certified Agents from referring player-clients to non-Registered financial advisors, this stems not from the Code governing Registered Advisors, but from the NFLPA's rules for Certified Agents.<sup>74</sup>

Second, the Code establishes the application and eligibility requirements for becoming a Registered Advisor.<sup>75</sup> Today, these requirements include, among other things:

- a bachelor's degree;<sup>76</sup>
- eight years of relevant work experience;<sup>77</sup>
- certification as a Certified Financial Planner or Chartered Financial Analyst;<sup>78</sup>
- a record clear of criminal, civil, or regulatory fraud;<sup>79</sup>
- a record clear of pending felony indictments and felonies convictions within the past decade;<sup>80</sup>

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<sup>71</sup> See generally 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59; 2016 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 67; 2012 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 67; SEC No-Action Letter to NFLPA, *supra* note 17.

<sup>72</sup> See 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 6.

<sup>73</sup> See *supra* Section I.A.1; Deubert, Cohen & Fernandez, *supra* note 3, at 268 (“[W]hile contract advisors [i.e., agents] are required to be certified by the NFLPA to perform their duties, financial advisors are under no obligation to register with the NFLPA.”).

<sup>74</sup> See NFLPA, REGULATIONS GOVERNING CONTRACT ADVISORS 8–10 (Aug. 2016) [hereinafter REGULATIONS GOVERNING CONTRACT ADVISORS], <https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/Regulation-AmendedAugust2016.pdf> [<https://perma.cc/Z4VW-YPMV>].

<sup>75</sup> See 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 6–11.

<sup>76</sup> See *id.* at 6.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.* at 7.

<sup>79</sup> See *id.* at 9–10.

<sup>80</sup> See *id.* at 10.

- a record clear of insolvency (within the past seven years) and loan defaults (within the past decade);<sup>81</sup>
- an application without misrepresentations;<sup>82</sup>
- a successful background check;<sup>83</sup>
- a \$2,500 fee for new applicants (\$500 of which is refundable if the applicant is rejected);<sup>84</sup>
- a \$1,500 fee for renewal applicants (\$500 of which is refundable if the applicant is rejected);<sup>85</sup> and
- both professional liability insurance and fidelity bonding, at minimum levels determined by a Registered Advisor’s assets under management, as shown in Table 1 below.<sup>86</sup>

TABLE 1<sup>87</sup>

Total Assets Under Management	Required Limits: Professional Liability (E&O)	Required Limits: Crime/Fidelity Bond
\$1 Billion+	\$10,000,000 Occurrence/ \$10,000,000 Policy Aggregate	\$10,000,000 Occurrence/ \$10,000,000 Policy Aggregate
\$500,000,000– \$999,999,999	\$5,000,000 Occurrence/ \$5,000,000 Policy Aggregate	\$5,000,000 Occurrence/ \$5,000,000 Policy Aggregate
\$250,000,000– \$499,999,999	\$3,000,000 Occurrence/ \$3,000,000 Policy Aggregate	\$3,000,000 Occurrence/ \$3,000,000 Policy Aggregate
\$0– \$249,999,999	\$2,000,000 Occurrence/ \$2,000,000 Policy Aggregate	\$2,000,000 Occurrence/ \$2,000,000 Policy Aggregate

Third, the Code defines the rules, requirements, code of conduct, and dispute-resolution procedures that govern Registered Advisors.<sup>88</sup> Today, these rules mandate that Registered Advisors, among other things:

- send quarterly financial statements to player-clients;<sup>89</sup>

<sup>81</sup> See *id.* at 11.

<sup>82</sup> See *id.*

<sup>83</sup> See *Apply to Be a Financial Advisor*, NFLPA, <https://nflpa.com/financial-advisors/new-applications> [<https://perma.cc/SV37-VCNR>].

<sup>84</sup> See *id.*

<sup>85</sup> See *Financial Advisor Renewal Applications*, NFLPA, <https://www.nflpa.com/financial-advisors/renewal-applications> [<https://perma.cc/ZMT8-NR5K>].

<sup>86</sup> See 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 8.

<sup>87</sup> See *id.* (publishing original version of this table).

<sup>88</sup> See *generally* 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59.

<sup>89</sup> See *id.* at 14.

- notify player-clients and the NFLPA within thirty days of violating the Code or enduring a professional-status change (for example, termination, notice of arbitration or other action, bankruptcy);<sup>90</sup>
- assume a fiduciary duty<sup>91</sup> and act in player-clients' best interests at all times;<sup>92</sup> and
- comply with the Registration Program's procedures for arbitration and discipline.<sup>93</sup>

Fourth, the Code clarifies that the NFLPA neither endorses nor makes any representations about any Registered Advisors, disclaiming any liability and responsibility for their conduct.<sup>94</sup> Relatedly, the Code also forbids Registered Advisors from implying that their inclusion in the Registration Program suggests integrity or expertise, let alone any sort of NFLPA endorsement.<sup>95</sup>

## 2. Registered Advisors' Benefits from the Registration Program

The benefits enjoyed by Registered Advisors seem to have changed little throughout the Registration Program's history. For example, before launching the Registration Program, the NFLPA made known its intent to prohibit its Certified Agents from referring player-clients to non-Registered financial advisors,<sup>96</sup> effectively monopolizing Certified Agents' financial-advisor referrals for those in the Registration Program—a significant competitive advantage. Other tangible benefits enjoyed by Registered Advisors include:

- a listing on the NFLPA's searchable, password-protected online database<sup>97</sup> that prospective players, former players, active players, Certified Agents,<sup>98</sup> and Registered Advisors can access;<sup>99</sup>

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<sup>90</sup> *See id.*

<sup>91</sup> *See id.* at 18.

<sup>92</sup> *See id.* at 16.

<sup>93</sup> *See id.* at 14.

<sup>94</sup> *See id.* at 19–20.

<sup>95</sup> *See id.* at 17.

<sup>96</sup> *See* SEC No-Action Letter to NFLPA, *supra* note 17, at \*17 (“A Certified [Agent] may not . . . refer players to financial advisors who are not registered in the Program.”).

<sup>97</sup> *See* *How do I find a qualified financial advisor on the NFLPA's website?*, NFLPA, <https://nflpa.com/active-players/faq/how-do-i-find-a-qualified-financial-advisor-on-the-nflpas-website> [<https://perma.cc/V9V7-NQYP>].

<sup>98</sup> *See* NFLPA, FINANCIAL ADVISOR FREQUENTLY ASKED QUESTIONS 2 [hereinafter REGISTRATION PROGRAM FAQs], <https://nflpaweb.blob.core.windows.net/website/PDFs/financial-advisor-FAQs.pdf> [<https://perma.cc/38N8-Q57D>] (“Active

- the NFLPA’s promotion of the Registration Program to players and Certified Agents;<sup>100</sup>
- access to “unique information on NFL players, their benefits, and compensation structure”;<sup>101</sup> and
- inclusion in educational events (for example, an annual NFLPA conference).<sup>102</sup>

Intangibly, Registered Advisors also often enjoy a presumption of legitimacy and competence among player-clients and prospective player-clients.<sup>103</sup>

### 3. Newly Announced Institutional Registration

Finally, any overview of the Registration Program’s evolution would be incomplete without mention of *The Athletic’s* October 17, 2019 report (“*The Athletic Report*”), which revealed that the NFLPA was signing up financial firms—Goldman Sachs and Bessemer Trust—for the Registration Program, uncharted territory for a union that had previously registered only individuals.<sup>104</sup>

Little has been written about this change to the Registration Program beyond *The Athletic Report*, which quotes senior NFLPA and Goldman Sachs officials, and established, among other things, that:

- the union’s desire to ensure player members’ preparedness for a then-potential labor stoppage<sup>105</sup> upon the 2021 expiration of the

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and former NFL players, as well as Certified Contract Advisors have access to the Registered Player Financial Advisor web-based list. Prospective NFL players are provided information regarding advisors on the list upon request.”).

<sup>99</sup> See SEC No-Action Letter to NFLPA, *supra* note 17, at \*19 (“Access to the electronic or printed version of the directory will be limited to players, registered advisors, and Certified Contract Advisors . . .”).

<sup>100</sup> See *Will I have direct access to the players and contract advisors to introduce myself and my services?*, NFLPA, <https://nflpa.com/financial-advisors/faq/will-i-have-direct-access-to-the-players-and-contract-advisors-to-introduce-myself-and-my-services> [<https://perma.cc/FM6Z-J76Q>].

<sup>101</sup> 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 1.

<sup>102</sup> See *Why did the NFLPA create a registration program for financial advisors?*, NFLPA, <https://nflpa.com/agents/how-to-become-an-https://nflpa.com/active-players/faq/why-did-the-nflpa-create-a-registration-program-for-financial-advisors> [<https://perma.cc/FAH2-SHWW>].

<sup>103</sup> See *infra* Section II.A.

<sup>104</sup> See Jessop & Kaplan, *supra* note 1.

<sup>105</sup> Of course, preparing for a labor stoppage is no longer a near-term concern of the NFLPA, as it agreed with the NFL Management Council on a new CBA in March 2020 that runs through 2030. See Grant Gordon, *NFL player vote ratifies new*

2011 collective bargaining agreement (“CBA”) catalyzed the partnership between the NFLPA and Goldman;<sup>106</sup>

- Bessemer and Goldman plan to register “about six” and “up to 20” advisors, respectively;<sup>107</sup>
- besides Goldman and Bessemer, the NFLPA had already interviewed five other prospective institutions for the Registration Program and anticipated further interviews;<sup>108</sup>
- the NFLPA employed an “invitation only process based on institutions that had a great brand and reputation.”<sup>109</sup>

And the NFLPA apparently did not announce the Registration Program’s expansion to its Certified Agents until a few weeks after *The Athletic Report* had been published.<sup>110</sup> Indeed, a leaked memorandum, sent from an NFLPA official to Certified Agents in November 2019, stated:

As you are aware, our mission as the players union is to make sure our player members #StayReady for any situation, particularly when it comes to their finances in the event of a work stoppage. In our latest effort to give them peace of mind and flexibility with their money, we have launched an enhanced suite of financial services. Here are the platform’s new features . . . .

The Financial Advisor Registration Program has been expanded to include institutions. Goldman Sachs and Bessemer are the first two institutions to enter into an agreement with the NFLPA to designate advisors for participation in the [Registration] Program. This expansion provides players with greater access to trustworthy options. . . .<sup>111</sup>

But neither *The Athletic Report* nor the NFLPA memorandum addressed *why* the NFLPA had never registered firms (“Registered Firms”) in the Registration Program before. Curiously, as early as the NFLPA’s No-Action Letter request to the SEC—before the NFLPA had even launched the Regis-

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*CBA through 2030 season*, NAT’L FOOTBALL LEAGUE (Mar. 15, 2020), <http://www.nfl.com/news/story/0ap3000001106246/article/nfl-player-vote-ratifies-new-cba-through-2030-season> [<https://perma.cc/D4M5-ENUV>].

<sup>106</sup> See Jessop & Kaplan, *supra* note 1.

<sup>107</sup> See *id.*

<sup>108</sup> See *id.*

<sup>109</sup> *Id.*

<sup>110</sup> See Memorandum from Dana Shuler, Senior Director, Player Affairs, NFLPA, to NFLPA Certified Contract Advisors [i.e., Certified Agents] (Nov. 5, 2019), appended to Darren Heitner (@DarrenHeitner), TWITTER (Nov. 6, 2019, 8:57 AM), <https://twitter.com/DarrenHeitner/status/1192123849590132737> [<https://perma.cc/6VBL-PNYQ>].

<sup>111</sup> *Id.*

tration Program—the union accounted for the possibility of entering bespoke agreements with financial institutions, writing, “a Firm may be permitted to enter into a separate agreement with the NFLPA *under which the Firm will not be subject to the {Registration} Program regulations.*”<sup>112</sup> Moreover, today’s Code, last updated in 2017, similarly allows for unique institutional agreements:

The NFLPA may, *in its sole discretion*, request proposals for, and authorize qualified firms to participate in, the Institutional Financial Advisors Program. Firms participating in the Institutional Financial Advisors Program must meet all of the requirements established by the NFLPA from time to time, *which requirements may include any or all of the requirements enumerated . . . below . . .*<sup>113</sup>

Given that the NFLPA has carved out such broad flexibility to accommodate Registered Firms since the Registration Program’s inception, it is surprising that the NFLPA did not welcome institutions into the Registration Program earlier.

Equally surprising is how significantly the Code’s application process for Registered *Firms*—based on the NFLPA’s “sole discretion”<sup>114</sup> and proceeding on an “invitation only” basis for firms with “a great brand and reputation”<sup>115</sup>—contrasts with its rigidly meritocratic application process for Registered *Advisors*. Under the latter process, the union accepts any applicant who “meets the [Registration] Program’s published requirements . . . and agrees to comply with the [Registration] Program’s published regulations.”<sup>116</sup> To be sure, the Code’s requirements for Registered Firms are not completely devoid of the bright-line rules that govern Registered Advisors: the Code suggests that Registered Firms must designate employees (“Designated Employees”) to advise players, and that these Designated Employees must have a bachelor’s degree and at least eight years of relevant work experience, just like Registered Advisors.<sup>117</sup> The Code also requires Designated Employees, like Registered Advisors, to have a record clear of disqualifying conduct, which includes, among other things, fraud-related crimes, fraud-related civil judgments, felonies within the past dec-

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<sup>112</sup> See SEC No-Action Letter to NFLPA, *supra* note 17, at \*12 (emphasis added).

<sup>113</sup> 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 11 (emphasis added).

<sup>114</sup> *Id.*

<sup>115</sup> Jessop & Kaplan, *supra* note 1.

<sup>116</sup> SEC No-Action Letter to NFLPA, *supra* note 17, at \*2.

<sup>117</sup> See 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 13.

ade, regulatory discipline, and insolvency within the past seven years.<sup>118</sup> Unlike Registered Advisors, however, Designated Employees need not necessarily be a Certified Financial Planner or Chartered Financial Analyst, so long as at least one Designated Employee per Registered Firm maintains one of the two certifications.<sup>119</sup> The Code also tasks each Registered Firm with vetting its Designated Employees.<sup>120</sup>

All in all, though, much remains unknown about this expansion of the Registration Program (“Institutional Registration”). For example, it remains unclear whether Goldman and Bessemer have actually established any Designated Employees yet: *The Athletic Report* stated that “Bessemer *will* add about six . . . and Goldman up to 20” advisors to the Registration Program,<sup>121</sup> and, what is more, the NFLPA had already closed the application window for new Registration Program applicants by late July 2019,<sup>122</sup> more than two months before *The Athletic Report*<sup>123</sup> was published and more than three months before the NFLPA sent its memorandum to Certified Agents.<sup>124</sup>

It is also unclear whether any other institutions since Goldman and Bessemer have signed-on as Registered Firms. In February 2020, Daniel Kaplan, co-author of *The Athletic Report*, characterized the NFLPA’s agreement with Goldman and Bessemer as “a pilot program,”<sup>125</sup> perhaps imply-

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<sup>118</sup> See *id.* at 9–11

<sup>119</sup> See *id.* at 13.

<sup>120</sup> See *id.* at 11–12; Jessop & Kaplan, *supra* note 1 (“The Difference with Goldman and Bessemer is they now will be responsible for monitoring *their* advisers in the program.”).

<sup>121</sup> See Jessop & Kaplan, *supra* note 1 (emphasis added) (suggesting, by using “will,” that neither firm had established Designated Employees at the time of publication).

<sup>122</sup> See *Financial Advisors Application and Renewal*, NFLPA (July 27, 2019), <https://web.archive.org/web/20190727202555/https://www.nflpa.com/financial-advisors/financial-advisors-application-and-renewal> [<https://perma.cc/6PPT-JRFR>] (memorializing NFLPA webpage stating, as of July 27, 2019, that “[t]he 2019 Application window [for non-renewal applicants] is closed and will open again in the Spring of 2020”); see also *Apply to Be a Financial Advisor*, NFLPA (Apr. 22, 2020), <https://web.archive.org/web/20200422171718/https://nflpa.com/financial-advisors/new-applications> [<https://perma.cc/5MA6-3ZG9>] (memorializing NFLPA webpage stating, as of April 22, 2020 that “[t]he application window [for non-renewal applicants] will open in the Spring of 2020”).

<sup>123</sup> See Jessop & Kaplan, *supra* note 1 (establishing October 17, 2019 date of *The Athletic Report*).

<sup>124</sup> See Memorandum from Dana Shuler, *supra* note 110 (establishing November 5, 2019 date of memorandum).

<sup>125</sup> Daniel Kaplan, *Redskins' Adrian Peterson in arbitration with Morgan Stanley in latest money dustup*, ATHLETIC (Feb. 12, 2020), <https://theathletic.com/1600748/>

ing a “wait-and-see” approach that seems inconsistent with the aggressive interview strategy detailed a few months earlier in *The Athletic Report*.

Finally, the NFLPA’s website offers some limited information on Institutional Registration, beyond what is in the Code. One relevant web page states:

The NFLPA has agreements in place with certain reputable financial institutions. These institutions select and monitor financial advisors who meet specific criteria and follow a code of conduct when dealing with NFL players.

If you are looking for a *concierge-like experience*, consider selecting a financial advisor who is part of the Institutional Program. You will work with an established point of contact to help you identify the appropriate advisor or team to suit your needs. The participating institutions and their advisors offer financial advisory services that are *tailored to players’ goals*.

We also have an individual financial advisors program. This diverse group of well-established advisors are vetted and meet the NFLPA’s educational, experiential, and regulatory standards. They also abide by a code of conduct and we do due diligence checks on them on an ongoing basis.<sup>126</sup>

Furthermore, a second relevant web page explains that both Registered Advisors and Registered Firms must “meet NFLPA criteria and abide by our code of conduct.”<sup>127</sup> But while Registered Advisors meet “standards of education, experience and regulations as established by the NFLPA,” Registered Firms not only meet “the same standards” but also “provide a *concierge-like experience for clients*, with an *added layer of evaluation* done by their institution *for your protection*.”<sup>128</sup>

Notably, the language on both of these webpages arguably conflicts with one of the NFLPA’s key representations on which the SEC based its No-Action Letter: that the union “will not advise players as to the merits or shortcomings of any particular [Registered Advisor].”<sup>129</sup> Indeed, one could argue that describing the Institutional Program as a “concierge-like experi-

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2020/02/12/redskins-adrian-peterson-in-arbitration-with-morgan-stanlatwatey-in-latest-money-dustup/ [https://perma.cc/SB9R-YSRF].

<sup>126</sup> *How can the NFLPA’s financial advisor programs benefit me?*, NFLPA (emphasis added), <https://nflpa.com/active-players/faq/how-can-the-nflpas-financial-advisor-programs-benefit-me>, [https://perma.cc/UV76-DGFH].

<sup>127</sup> *Find a Financial Advisor*, NFLPA, <https://nflpa.com/active-players/find-a-financial-advisor> [https://perma.cc/6KEY-37XW].

<sup>128</sup> *See id.* (emphasis added).

<sup>129</sup> SEC No-Action Letter to NFLPA, *supra* note 17, at \*6.

ence”<sup>130</sup>—that offers both “tailored”<sup>131</sup> services and “an added layer of evaluation . . . for [players’] protection”<sup>132</sup>—constitutes “adv[is]ing] players as to the merits”<sup>133</sup> of using a Registered Firm (rather than a Registered Advisor). This seems to be a risky choice of language from the NFLPA, particularly given that some Registered Advisors are reportedly “quite displeased that NFLPA has cozied up to . . . Goldman Sachs [and] Bessemer,” and have “express[ed] concern that NFLPA is impliedly telling players that they should be switching to those companies.”<sup>134</sup>

## II. ANALYSIS OF THE REGISTRATION PROGRAM

As mentioned, the NFLPA launched the “[Registration] Program to protect former, current and prospective NFL players . . . from fraud.”<sup>135</sup> Unfortunately, however, in many respects, the Registration Program has failed to accomplish this goal. In 2016, a leading investment-fraud attorney to athletes, Chase Carlson,<sup>136</sup> estimated that Registered Advisors have swindled athletes out of hundreds of millions of dollars.<sup>137</sup> Similarly, sports-busi-

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<sup>130</sup> *How can the NFLPA's financial advisor programs benefit me?*, *supra* note 126; *Find a Financial Advisor*, *supra* note 127.

<sup>131</sup> *How can the NFLPA's financial advisor programs benefit me?*, *supra* note 126.

<sup>132</sup> *Find a Financial Advisor*, *supra* note 127.

<sup>133</sup> SEC No-Action Letter to NFLPA, *supra* note 17, at \*6.

<sup>134</sup> Darren Heitner (@DarrenHeitner), TWITTER (Nov. 6, 2019, 8:57 AM), <https://twitter.com/DarrenHeitner/status/1192123849590132737> [<https://perma.cc/6VBL-PNYQ>].

<sup>135</sup> SEC No-Action Letter to NFLPA, *supra* note 17, at \*1.

<sup>136</sup> Mr. Chase Carlson is a Miami-based attorney who focuses a “significant portion of [his] practice . . . [on] representing professional athletes and entertainers who are victims of investment fraud or mismanagement.” See *About*, CARLSON LAW, <https://www.carlsonlaw.com/about/> [<https://perma.cc/LX6C-B52P>]. A *Washington Post* profile from last year describes Mr. Carlson as “the guy athletes hire to find their money when the people they’ve trusted to watch that money instead have made it disappear.” See Patrick Hruby, *Athletes Hire Him When They Think They’ve Been Swindled*, WASH. POST (May 9, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/05/09/feature/athletes-hire-him-when-they-think-theyve-been-swindled/> [<https://perma.cc/A79H-3YKS>].

<sup>137</sup> See Chase Carlson (@ChaseACarlson), TWITTER (Oct. 25, 2016, 12:50 PM), <https://twitter.com/ChaseACarlson/status/791004138242998272> [<https://perma.cc/5ESS-ZGFF>] (“estimat[ing] athletes have lost \$150,000,000 investing with NFLPA Registered Advisors since the Program was created in 2002”); Chase Carlson (@ChaseACarlson), TWITTER (Oct. 25, 2016, 2:34 PM), <https://twitter.com/chaseacarlson/status/791030110208069632> [<https://perma.cc/4TR6-KZLH>] (confirming that his estimate of athletes suffering \$150,000,000 in “losses” from investments with Registered Advisors “exclusively” comprised losses from “defrauding/fraud,”

ness journalist Darren Rovell has asserted that “more money has been lost by NFL players since the advent of the financial advisor program than any time in NFLPA history,”<sup>138</sup> a claim which at least one economist evidently agrees.<sup>139</sup>

Empirical data on fraud among professional athletes also suggests that the Registration Program has failed to protect NFL players from fraud. In 2019, Ernst & Young published a study (“EY Study”), in which it used publicly available information to compile a database on the fraud-related losses alleged by professional athletes from 2004 to 2018.<sup>140</sup> On the whole, the EY Study found that, across all sports—including boxing, baseball, basketball, football, hockey, running, and soccer—“professional athletes alleged almost \$600 million in fraud-related loss” during the fifteen-year span.<sup>141</sup> What is more, because of “the difficulty in detecting fraud and the reluctance of victims to acknowledge it publicly,” the EY Study suggested this figure is “likely not the half of it.”<sup>142</sup> The EY Study also analyzed their

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and thus did not include non-fraudulent investment losses); Chase Carlson (@ChaseACarlson), TWITTER (Oct. 26, 2016, 11:39 AM), <https://twitter.com/chaseacarlson/status/791348529184772096> [<https://perma.cc/TUT9-NWME>] (acknowledging that he “[w]ouldn’t be surprised if the real number [of fraudulent losses suffered by athletes investing with Registered Advisors] is much higher [than \$150,000,000]” and that he “[j]ust used a number [that he] can prove”); Chase Carlson (@ChaseACarlson), TWITTER (Oct. 25, 2016, 12:58 PM), <https://twitter.com/chaseacarlson/status/791006006625050625> [<https://perma.cc/6B6Q-K834>] (explaining that his \$150,000,000 estimate was “[m]ostly” based on “publicly available records and court findings” and that a “[s]maller amount” reflected “personal knowledge”).

<sup>138</sup> Darren Rovell (@darrenrovell), TWITTER (Apr. 6, 2017, 8:51 AM), <https://twitter.com/darrenrovell/status/850013154042150914> [<https://perma.cc/HH62-BDCP>]. Mr. Rovell has also contended that the Registration Program has failed to meet its stated fraud-protection goal. *See* Darren Rovell (@darrenrovell), TWITTER (Oct. 23, 2016, 4:16 PM), <https://twitter.com/darrenrovell/status/790331116376862720> [<https://perma.cc/DF7R-DDVQ>] (“The NFLPA financial advisers program needs to end . . . Its goal to curb fraud has supremely failed.”).

<sup>139</sup> *See* Ted Tatos (@TedTatos), TWITTER (Apr. 6, 2017, 4:21 PM), <https://twitter.com/TedTatos/status/850126446953549824> [<https://perma.cc/CRL3-KKP9>] (replying “[n]o dispute from me there” to Darren Rovell’s claim that “more money has been lost by NFL players since the advent of the financial advisor program than any time in NFLPA history”).

<sup>140</sup> *See* STEVE SPIEGELHALTER & JESSE SILVERTOWN, *ATHLETES TARGETED BY FRAUD*, ERNST & YOUNG 2, 3 n.1 (2019), [https://assets.ey.com/content/dam/ey-sites/ey-com/en\\_us/topics/assurance/ey-forensics-athletes-targeted-by-fraud-june-2019.pdf](https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/assurance/ey-forensics-athletes-targeted-by-fraud-june-2019.pdf) [<https://perma.cc/J8LB-5AGF>].

<sup>141</sup> *Id.* at 2.

<sup>142</sup> *Id.*

database on a sport-specific basis, finding that NFL players alone accounted for about one-fourth (a plurality) of fraud losses alleged by all professional athletes during the fifteen-year period.<sup>143</sup> And when considering just the “Big Four” professional sports leagues<sup>144</sup>—the NFL, Major League Baseball (“MLB”), the National Basketball Association (“NBA”), and the National Hockey League (“NHL”)—NFL players also accounted for a disproportionate percentage of alleged fraud losses. Indeed, though NFL players earn about 33 percent of all compensation earned by players across the “Big Four” professional sports leagues,<sup>145</sup> they accounted for a signi-

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<sup>143</sup> *Id.*

<sup>144</sup> See, e.g., *Behind the Numbers: Professional sports and the merits of being big and connected*, DELOITTE (Aug. 8, 2015), <https://www2.deloitte.com/us/en/insights/economy/behind-the-numbers/us-professional-leagues-sports-and-technology.html> [<https://perma.cc/FR9T-KTMM>] (establishing the “Big Four” American professional leagues: “The NBA is the only major professional sports league that has set an attendance record over the last couple of years, *but the big 4*—NFL, NHL, NBA, and MLB—continue to enjoy impressive growth.” (emphasis added)).

<sup>145</sup> Salary data across the “Big Four” professional leagues is not readily available for most years during the period from 2004 to 2018, so this 33 percent figure (which was calculated by the author) stems only from players’ combined salaries in 2018—i.e., players’ salaries for the season in which their league’s championship game occurred in 2018. See GLOBAL SPORTS SALARY SURVEY 2018, SPORTING INTELLIGENCE 48 (Nick Harris ed., Nov. 2018), <https://www.globalsportssalaries.com/GSSS%202018.pdf> [<https://perma.cc/EKZ2-3W6Q>] (establishing that MLB players would earn salaries totaling \$3,957,697,825 for the 2018 season); GLOBAL SPORTS SALARY SURVEY 2017, SPORTING INTELLIGENCE 66 (Nick Harris ed., Nov. 2017), <https://www.globalsportssalaries.com/GSSS%202017.pdf> [<https://perma.cc/4332-W48Y>] (establishing that NBA players would earn salaries totaling \$3,159,069,802 for the 2017–2018 season); *id.* at 82 (establishing that NHL players would earn salaries totaling \$2,218,110,771 for the 2017–2018 season); *id.* at 86 (establishing that NFL players would earn salaries totaling \$4,580,501,744 for the 2017–2018 season). The total salaries earned across the four leagues in 2018, then, sum to \$13,915,380,142—of which NFL players’ share, \$4,580,501,744, is 33 percent. That said, for the years for which salary data was readily available across the “Big Four” professional leagues, NFL players’ share of earnings is similar to—indeed, even lower than—its 33 percent share in 2018: 32 percent in 2017, 31 percent in 2015, and 32 percent in 2014 (salary data from *Sporting Intelligence* was not readily available for 2016—i.e., the 2015–2016 NFL, NBA, and NHL seasons). See *id.* at 70 (providing MLB players’ combined salaries for the 2017 season); GLOBAL SPORTS SALARY SURVEY 2016, SPORTING INTELLIGENCE 20 (Nick Harris ed., Nov. 14, 2016) <https://www.globalsportssalaries.com/GSSS%202016.pdf> [<https://perma.cc/CSB2-NW5Z>] (providing NBA players’ combined salaries for the 2016–2017 season); *id.* at 28 (providing NHL players’ combined salaries for the 2016–2017 season); *id.* at 30 (providing NFL players’ combined salaries for the 2016–2017 season); *id.* at 22 (providing MLB players’ combined salaries for the 2016 season); GLOBAL SPORTS SALARY SURVEY 2015, SPORTING INTELLIGENCE 28

ificantly greater share—44 percent—of alleged fraud losses from 2004 to 2018.<sup>146</sup>

Taken together, one could persuasively argue that the Registration Program has failed to achieve its goal of protecting NFLPA player-members from fraud. For that reason, it should come as no surprise that none of the other professional sports unions have followed the NFLPA's lead—that is, launched its own initiative to regulate their player-members' financial advisors.<sup>147</sup>

The rest of Part II analyzes three main ways that the Registration Program has failed to protect players. Section A explores how the Registration Program can give players a misleading sense of trust, putting players at greater risk of suffering financial exploitation. Section B examines how the Registration Program may actually damage—rather than improve—players' likelihood of retaining an ethical, qualified financial advisor. And finally, Section C details how the Registration Program fails to ensure that players victimized by predatory Registered Advisors can recover losses.

#### A. *Giving Players a Misleading Sense of Trust*

Notably, the EY Study did *not* just examine the extent of fraud alleged by professional athletes. It also considered *how* perpetrators defraud athletes, concluding that while “[f]raud schemes vary . . . there is a common theme:

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(Nick Harris ed., May 18, 2015), <https://www.globalsportssalaries.com/GSS%202015.pdf> [<https://perma.cc/A2DN-WB2W>] (providing NBA, NHL, and NFL players' respective combined salaries for the 2014–2015 season); *id.* at 42 (providing the average salary and number of MLB players for the 2015 season, which the author multiplied together to calculate MLB players' combined salaries for the 2015 season); GLOBAL SPORTS SALARY SURVEY 2014, SPORTING INTELLIGENCE 17–18 (Nick Harris ed., Apr. 14, 2014), <https://www.globalsportssalaries.com/GSS%202014.pdf> [<https://perma.cc/EF3U-CMH2>] (providing each of MLB's, the NBA's, the NHL's, and the NFL's average salaries and number of players for the 2013–2014 season, which the author multiplied together to calculate each league's combined salaries for the 2013–2014 season).

<sup>146</sup> See SPIEGELHALTER & SILVERTOWN, *supra* note 140, at 2. (The authors of the EY study generously provided the exact numbers from the bar chart on page 2—which is entitled “Alleged fraud losses by athletes' sports”—by email to this Article's author, with whom they remain on file. Using these figures, the author of this Article calculated that NFL players account for 44 percent of fraud losses alleged by professional athletes across the “Big Four” sports leagues from 2004 to 2018.)

<sup>147</sup> See Deubert, Cohen & Fernandez, *supra* note 3, at 267 (“The NFLPA's financial advisor program was, and remains, the only one of its kind among the major American sports unions . . .”).

the fraud perpetrator *gains the athlete's trust . . . and leverages the relationship of trust* into the fraudster's own financial windfall."<sup>148</sup>

It is unfortunate, then, that, in at least four ways, the Registration Program can give players a misleading sense of trust, rendering them more vulnerable to financial exploitation.<sup>149</sup>

### 1. Constant Contradiction: The NFLPA's Relationship with the Registration Program

Publicly, the NFLPA insists that a financial advisor's inclusion in the Registration Program does *not* constitute a union endorsement. Indeed, its Code makes clear that the NFLPA does not endorse, claim responsibility for, or make any representations about "the skill, honesty, or competence of any Registered . . . Advisor."<sup>150</sup> Furthermore, since 2011, the NFL-NFLPA CBA has waived the NFLPA's liability for the Registration Program with the following language: "[P]layers and any advisors who [the players] select will bear sole responsibility for any investment or financial decisions that are made."<sup>151</sup> And prior CBAs, beginning in 1993, employed similar language

<sup>148</sup> SPIEGELHALTER & SILVERTOWN, *supra* note 140, at 4 (emphasis added).

<sup>149</sup> One notable individual who reached a similar conclusion (well before the author) about the Registered Program perhaps giving players a misleading sense of trust is retired-NFL-player-turned-Certified-Financial-Planner Tyler Horn, who wrote an insightful piece in 2016 about the Registration Program for *The Player's Tribune*. See Tyler Horn, *Ballers: Season 2, Episode 5 Recap*, PLAYERS' TRIBUNE (Aug. 16, 2016), <https://legacy.theplayerstribune.com/ballers-season-2-episode-5-recap/> [<https://perma.cc/CM39-P67V>] ("I think it can be argued that the union is providing a false sense of trust [with the Registration Program]—and that's potentially dangerous [for players]. . . . I have seen friends and former teammates who have lost their fortunes and their futures due to [such] a false sense of trust in their advisors."). See also Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 1:18 PM), <https://twitter.com/ChaseACarlson/status/790648637357424641> [<https://perma.cc/V8ZU-VWXB>] ("There are some good advisors in the program, but players [are] given a false sense of security & aren't made aware of the program's shortcomings"); Darren Rovell (@darrenrovell), TWITTER (July 23, 2019, 7:16 PM), <https://twitter.com/darrenrovell/status/1153851316822847489> [<https://perma.cc/4QSW-XD2R>] ("The problem is that the NFLPA Financial Advisors program is an awful idea. It allows advisors to pass a test to get a license to gain immediate credibility that is overstated.").

<sup>150</sup> See 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 19–20.

<sup>151</sup> NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL AND NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT 2011–2020, NFL LABOR (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/3DZ6-S664>].

vis-à-vis the NFL-NFLPA “Career Planning Program,” in which the parties agreed “that players shall be solely responsible for their personal finances.”<sup>152</sup>

Of course, these disclaimers do not change the fact that the NFLPA designed, launched, and continues to operate the Registration Program.<sup>153</sup> Or that the NFLPA still “routinely promotes the [Registration] Program to players and [Certified Agents].”<sup>154</sup> Or that the NFLPA still prohibits Certified Agents from recommending non-Registered financial advisors to their player-clients.<sup>155</sup> Or that the NFLPA, among other things:

- admitted to the SEC in 2002 that “[p]roviding a pre-screened list of registered financial advisors to players could be viewed as referring clients and prospective clients to the registered financial advisors”;<sup>156</sup>
- “vigorously encourag[ed]” players to use only Registered Advisors in 2004;<sup>157</sup>

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See also NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL AND NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT 2020–2030, NFL LABOR 289 (Mar. 15, 2020), <https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/NFL-NFLPA%20CBA%20March%205,%202020.pdf> [<https://perma.cc/4TDZ-CSYZ>] (establishing that identical language remains in the newly negotiated CBA). This extra layer of protection for the NFLPA was incorporated into the next CBA after *Atwater v. National Football League Players Ass’n*, 626 F.3d 1170 (11th Cir. 2010). And because the Registration Program arises directly from the CBA, players’ common-law claims stemming from the Registration Program against the NFLPA are generally preempted under § 301 of the Labor Management Relations Act. See *Atwater*, 626 F.3d at 1174, 1179–1185 (holding that § 301 of the Labor Management Relations Act preempts claims of negligence, negligent misrepresentation, and breach of fiduciary duty against the NFLPA for conducting allegedly insufficient background checks on two Registered Advisors who defrauded the plaintiffs—six retired NFL players—of the collective \$20 million they unknowingly invested in the Registered Advisors’ Ponzi scheme).

<sup>152</sup> *Atwater*, 626 F.3d at 1174–75.

<sup>153</sup> See generally SEC No-Action Letter to NFLPA, *supra* note 17 (establishing that the NFLPA designed the Registration Program); 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59 (establishing that the NFLPA launched and continues to run the Registration Program).

<sup>154</sup> See *Will I have direct access to the players and contract advisors to introduce myself and my services?*, *supra* note 100.

<sup>155</sup> See REGULATIONS GOVERNING CONTRACT ADVISORS, *supra* note 74, at 8–10.

<sup>156</sup> SEC No-Action Letter to NFLPA, *supra* note 17, at \*28.

<sup>157</sup> See Amended Complaint ¶ 42, *Atwater v. Nat’l Football League Players Ass’n*, No. 1:06-CV-1510, (N.D. Ga. July 14, 2006).

- touted a survey purportedly finding that “players won’t even consider [hiring] an advisor unless he or she is part of the [P]rogram” in its March 2005 newsletter for its player-members;<sup>158</sup>
- boasted that “[t]he [Registration] Program creates a ‘safe zone’” for players in the same March 2005 newsletter for player-members;<sup>159</sup>
- publicly explained an applicant’s acceptance into the Registration Program to *The New York Post* in March 2006 as the NFLPA “basically tell[ing] players looking for financial advice that these folks have been vetted by us and that they can be reasonably assured of their background and education”;<sup>160</sup>
- reportedly doubled down on the Registration Program in their communications with Certified Agents, instructing them in a December 2012 memorandum to tell their player-clients that they “are encouraged to use *only* those financial advisors who are NFLPA-Registered Financial Advisors”;<sup>161</sup>
- “trumpeted the fact,”<sup>162</sup> in a November 2013 NFLPA-issued fraud alert, that a Phoenix-based financial advisor with “more than 60 current or former NFL players as clients”—who had just been arrested on eleven financial-fraud-related felony charges—was not in the Registration Program;<sup>163</sup>
- characterized its 2019 expansion of the Registration Program as “provid[ing] players with greater access to *trustworthy options*”;<sup>164</sup> and
- continues to champion Registered Advisors on its website as “tried and tested”<sup>165</sup> and “well-established.”<sup>166</sup>

It is thus easy to see how the Registration Program can give players a misleading sense of trust: despite the NFLPA’s disclaimers to the contrary,

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<sup>158</sup> See *id.* ¶ 44.

<sup>159</sup> See *id.* ¶ 46.

<sup>160</sup> *Id.* ¶ 49.

<sup>161</sup> See Jason Cole, *NFLPA Financial Advisor Program Fatally Flawed*, NAT’L FOOTBALL POST, <https://nationalfootballpost.com/nflpa-financial-advisor-program-fatally-flawed/> [<https://perma.cc/5B8W-UY3L>] (emphasis added).

<sup>162</sup> *Id.*

<sup>163</sup> See Letter from NFLPA Security Department, to NFLPA player-members (Nov. 18, 2013), [https://images.nflplayers.com/mediaResources/lyris/pdfs/SCAA%20Signals/11-19-13\\_Marchiol\\_Fraud.pdf](https://images.nflplayers.com/mediaResources/lyris/pdfs/SCAA%20Signals/11-19-13_Marchiol_Fraud.pdf) [<https://perma.cc/2333-B5CJ>].

<sup>164</sup> See Memorandum from Dana Shuler, *supra* note 110 (emphasis added).

<sup>165</sup> See *Why did the NFLPA create a registration program for financial advisors?*, *supra* note 102.

<sup>166</sup> See *How can the NFLPA’s financial advisor programs benefit me?*, *supra* note 126.

players continue to understand a Registered Advisor's inclusion in the Registration Program as an endorsement from their trusted union. Indeed, All-Pro tight end Vernon Davis and All-Pro running back Fred Taylor each admitted as much in a 2016 *60 Minutes* exposé that was highly critical of the Registration Program.<sup>167</sup> Davis, previously unaware of how little the NFLPA vetted its Registered Advisors, stated: "It's very troubling. Here I am putting my trust in a registered financial adviser, and I'm thinking that I can at least go to sleep at night without worrying."<sup>168</sup> Similarly, Taylor said that he "definitely would gain a sense of security with every registered adviser that's . . . on [the NFLPA's] list."<sup>169</sup> Davis and Taylor were two of more than thirty NFL players, including recent NFLPA president Eric Winston,<sup>170</sup> who collectively lost more than \$40 million after Jeff Rubin, then a Registered Advisor, persuaded them to invest in a rural-Alabama electronic-Bingo development<sup>171</sup>—even though NFL rules proscribed gambling investments by players.<sup>172</sup> Even worse, Rubin, who reportedly received 10 per-

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<sup>167</sup> See Armen Keteyian, *Thrown for a Loss*, 60 MINUTES (Oct. 23, 2016), <https://www.cbsnews.com/news/60-minutes-nfl-players-lose-millions-in-risky-investment/> [<https://perma.cc/R4SX-PQTC>].

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See *id.* ("We wanted to talk to the NFL Players Association and its current president, Cincinnati offensive tackle Eric Winston, about its financial advisers program. But after repeated requests the union declined to put anyone on camera, including Winston, who was once a client of Jeff Rubin's and invested around a million dollars in Country Crossing."); Kevin Patra, *Browns center JC Tretter elected next NFLPA president*, NAT'L FOOTBALL LEAGUE (Mar. 10, 2020), <https://www.nfl.com/news/browns-center-jc-tretter-elected-next-nflpa-president-0ap3000001105741> [<https://perma.cc/7FWC-SY3X>] ("The NFLPA voted to replace sitting president Eric Winston, who was not up for re-election after not playing in 2019.").

<sup>171</sup> See Keteyian, *supra* note 167. See also Jessop & Kaplan, *supra* note 1 ("In one of the most wide-reaching cases, NFLPA registered financial adviser Jeff Rubin defrauded 35 NFL players of \$43.6 million by having them invest in an electronic bingo resort venture in Alabama . . ." (emphasis added)). Among the NFL players who invested in the Alabama electronic-bingo development with Rubin "included Fred Taylor, Frank Gore, Jevon Kearse, Edgerrin James, Terrell Owens, Plaxico Burress, Duane Starks, Devin Thomas, Santana Moss, Greg Olsen, Greg Jones, Roscoe Parrish, Eric Winston, Hanik Milligan, Jerome McDougle, Chris Myers, Lito Sheppard, Jabar Gaffney, Jacob Bell, Sinorice Moss, Damione Lewis, Kenard Lang, Clinton Portis, Drew Stanton, Gabe Watson, and Peter Warrick." Chase Carlson, *The History Of Troubled NFLPA Registered Financial Advisors*, CARLSON-LAW.NET (Oct. 21, 2016), <https://www.carlson-law.net/the-history-of-troubled-nflpa-registered-financial-advisors/> [<https://perma.cc/DB9G-E2LA>].

<sup>172</sup> See Jason Cole & Rand Getlin, *Raucous lifestyle leads to fall of Jeff Rubin, former financial adviser to NFL players*, YAHOO! SPORTS (Sept. 4, 2012), <https://sports.yahoo>

cent of the money his player-clients invested in the development as a “finder’s fee,”<sup>173</sup> did not inform players of another significant risk of the investment: that state authorities could well determine electronic Bingo was illegal under Alabama’s “byzantine gambling laws,” and then shut down the operation.<sup>174</sup> Unfortunately, this is exactly what happened just two weeks after the development’s official opening.<sup>175</sup>

And Davis and Taylor are hardly the only players who have contended that the Registration Program gives players a misleading sense of trust; indeed, even among the most financially sophisticated players feel this way. For instance, Tyler Horn, a retired NFL player who is now a Certified Financial Planner, aptly characterized the Registration Program as a “paradox”: “[A]ny reasonable person would probably conclude that [Registered A]dvisors have been vetted and recommended by the NFLPA.”<sup>176</sup> In fact, Horn specifically accused the “union [of] providing [players with] a *false sense of trust* in their [Registered Advisors].”<sup>177</sup> Moreover, retired linebacker Scott Fujita, a University of California-Berkeley graduate who also served as an NFLPA representative, opined: “The message the NFLPA is sending to the players with the program is that these financial advisors are relatively safe. If that’s not the case, why do we have it?”<sup>178</sup> Similarly, retired player Matt Birk, who also served as an NFLPA player representative,<sup>179</sup> graduated from Harvard with an Economics degree, and later landed a post-retirement job with the NFL as Director of Football Development,<sup>180</sup> stated that he understood Registered-Advisor status “to mean that they’re OK, that the

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.com/news/nfl—raucous-lifestyle-leads-to-fall-of-jeff-rubin—former-financial-adviser-to-nfl-players-.html [https://perma.cc/6JDE-5L3Y].

<sup>173</sup> See *id.* (internal quotation marks omitted) (“Rubin [received] a 4 percent stake in the casino operation for bringing in investors, according to bankruptcy documents. In addition, . . . Rubin [received] a 10 percent ‘finder’s fee’ on any money he brought in. In essence, Rubin was getting a polite version of a kickback on what the players put in . . .”).

<sup>174</sup> See Keteyian, *supra* note 167.

<sup>175</sup> See *id.*

<sup>176</sup> Horn, *supra* note 149.

<sup>177</sup> *Id.* (emphasis added).

<sup>178</sup> Cole, *supra* note 161.

<sup>179</sup> See *id.* (establishing that Birk served as an NFLPA player representative).

<sup>180</sup> See *NFL names Matt Birk Director of Football Development*, NAT’L FOOTBALL LEAGUE (July 10, 2014), <https://www.nfl.com/news/nfl-names-matt-birk-director-of-football-development-0ap2000000364349> [https://perma.cc/2F88-M3RL] (establishing that Matt Birk both became the NFL’s Director of Football Development after retiring from the NFL and “graduate[d from] . . . Harvard University with a degree in economics”).

union has done its due diligence.”<sup>181</sup> Birk concluded that if the NFLPA is not going to conduct “thorough” vetting, then “the union shouldn’t be in the business of endorsing any people in the financial advisor industry.”<sup>182</sup>

## 2. Mistaking Registration for Certification

The widespread conflation of the NFLPA’s Registration Program with its Agent Certification Program represents another way the Registration Program can give players a misleading sense of trust. Indeed, when journalist Jason Cole contacted fifteen Certified Agents for his investigative piece on the Registration Program, twelve of the Certified Agents “used the word ‘certified’ when referring to financial advisors,” highlighting the pervasive “confusion over exactly what . . . NFLPA [Registration] means.”<sup>183</sup> This confusion persists among industry insiders, academics, and players, too. Law review articles,<sup>184</sup> textbooks,<sup>185</sup> reputable online publications,<sup>186</sup> and players

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<sup>181</sup> Cole, *supra* note 161.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> See, e.g., Walter T. Champion Jr., *The Rise and Fall of Kirk Wright: The NFLPA’s Fiduciary Obligation as Third-Party Guarantor of Certified Financial Advisors*, 4 MISS. SPORTS L. REV. 1 (2014) (using “certified” to describe NFLPA-Registered Financial Advisors despite author’s credentials as sports law professor and prolific author on sports law); Richard T. Karcher, *Solving Problems in the Player Representation Business: Unions Should Be the Exclusive Representatives of the Players*, 42 WILLAMETTE L. REV. 737, 747 (2006) (mistakenly identifying NFLPA-Registered advisors as “certified”); Timothy L. Kianka, *Atwater v. NFLPA: Casting Doubt on the Effect of Exculpatory Language in Collective Bargaining Agreements*, 21 JEFFREY S. MOORAD SPORTS L.J. 125, 149–150 (2014) (referring to financial advisors becoming “certified” under the NFLPA’s Financial Advisors Program); James Masteralexis, Lisa Masteralexis & Kevin Snyder, *Enough is Enough: The Case for Federal Regulation of Sports Agents*, 20 JEFFREY S. MOORAD SPORTS L.J. 69, 80 n.55 (2013) (noting the NFLPA’s voluntary financial-advisor “certification” program); Damon Moore, *Proposals for Reform to Agent Regulations*, 59 DRAKE L. REV. 517, 526–27 (2011) (explaining how the NFLPA “certifies” financial advisors).

<sup>185</sup> See, e.g., KENNETH L. SHROPSHIRE, TIMOTHY DAVIS & N. JEREMI DURU, *THE BUSINESS OF SPORTS AGENTS* 77–81 (3d ed. 2016) (detailing the NFLPA’s financial-advisor “certification” program); ADAM EPSTEIN, *SPORTS LAW* 13 (2012) (“No certified agent can recommend use of [a] non-NFLPA certified financial advisor.” (emphasis added)).

<sup>186</sup> See, e.g., Mullen, *supra* note 62 (discussing “NFLPA-certified” financial advisors); Darren Rovell, *The NFL’s financial advisory program*, ESPN (Oct. 4, 2012), [http://www.espn.com/blog/playbook/dollars/post/\\_id/1835/does-nfls-financial-advisory-program-work#correx](http://www.espn.com/blog/playbook/dollars/post/_id/1835/does-nfls-financial-advisory-program-work#correx) [<https://perma.cc/JCL2-V29K>] (analyzing the NFLPA’s “certified financial advisory program”).

themselves<sup>187</sup> erroneously reference the NFLPA's "certification"—rather than "registration"—of financial advisors.

The distinction between NFLPA Registration and Certification constitutes much more than a semantic quibble, as the Registration Program provides players "far less protection than the NFLPA [A]gent [C]ertification [P]rogram."<sup>188</sup> Indeed, the Certification Program's eligibility requirements are much more rigorous than the Registration Program's, requiring participants, among other things, to have:

- earned a graduate degree<sup>189</sup> (about 62 percent of Certified Agents are attorneys<sup>190</sup>);
- passed the rigorous NFLPA-proctored entrance exam<sup>191</sup> (more than 61 percent failed in 2015 after the NFLPA raised the minimum passing grade;<sup>192</sup> before 2015, about 30 percent failed in a typical year<sup>193</sup>);
- attended a two-day in-person NFLPA seminar for new agents.<sup>194</sup>

And the Certification Program's heightened protections extend beyond its exacting eligibility requirements; it also imposes tighter regulations after an

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<sup>187</sup> See, e.g., Nathan Beaucage, *The NFLPA drops the ball yet once again with flawed financial adviser program*, SB NATION: BALTIMORE BEATDOWN (June 30, 2016), <https://www.baltimorebeatdown.com/2016/6/30/12059600/the-nflpa-drops-the-ball-yet-once-again-with-flawed-financial-adviser> [https://perma.cc/DL57-ETK5] (quoting retired NFL punter Chris Kluwe who seems to conflate Registration with Certification: "My financial adviser told me a couple years ago that he was no longer taking the training to be *NFLPA certified* because they were using it as a moneymaking scheme (charging like a couple grand to *get certified*, no matter if you actually were capable or not) [emphasis added].") Kluwe's quote showcases how misinformation persists about the Registration Program, even among NFLPA members and Registered Advisors themselves. After all, as explained in Section I.A.2.b, *supra*, the NFLPA's No-Action Letter from the SEC turned on several critical union representations, including that "[t]he NFLPA will operate the [Registration] Program on a *non-profit* basis." See SEC No-Action Letter to NFLPA, *supra* note 17, at \*6 (emphasis added).

<sup>188</sup> SHROPSHIRE, DAVIS & DURU, *supra* note 185, at 79.

<sup>189</sup> See REGULATIONS GOVERNING CONTRACT ADVISORS, *supra* note 74, at 3 ("To be eligible for certification, the applicant must have received . . . a post-graduate degree from an accredited college/university.").

<sup>190</sup> See Deubert, Cohen & Fernandez, *supra* note 3, at 242.

<sup>191</sup> See *Becoming an Agent*, NFLPA, <https://nflpa.com/agents/how-to-become-an-agent> [https://perma.cc/G62K-FPY7].

<sup>192</sup> See Liz Mullen, *Pass rate plummets for agent certification exam*, SPORTS BUS. J. (Aug. 6, 2012), <https://www.sportsbusinessdaily.com/Journal/Issues/2015/10/19/Labor-and-Agents/Agent-exam.aspx> [https://perma.cc/F9G6-PXVB].

<sup>193</sup> See RUXIN, *supra* note 9, at 110.

<sup>194</sup> See *Becoming an Agent*, *supra* note 191.

applicant is accepted by the NFLPA. Indeed, unlike the Registration Program, the stricter Certification Program:

- sets default (1.5 percent) and maximum (3 percent) agent-compensation fees;<sup>195</sup>
- requires that Certified Agents inform the NFLPA of any criminal charges within ten business days (save for traffic fines of \$100 or less);<sup>196</sup>
- enables players to seek monetary damages from Certified Agents through arbitration;<sup>197</sup>
- empowers the NFLPA to discipline Certified Agents with monetary fines, among other things;<sup>198</sup> and
- prohibits non-Certified agents from representing players.<sup>199</sup>

Given how much more thorough the Certification Program's player protections are than the Registration Program's, it is easy to see how mistaking the Registration Program for the Certification Program could give players a misleading sense of trust.

To its credit, the NFLPA has shown it understands and appreciates the importance of the Certification-Registration distinction. Indeed, in 2012, the NFLPA felt so strongly about distinguishing its Certification Program from its Registration Program that it sent a "Letter to the Editor" to ESPN, which the union also published on its own website,<sup>200</sup> after then-ESPN journalist Darren Rovell penned a column in which he called the Registration

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<sup>195</sup> See Darren Heitner, *Why NFL Agents Are Furious With New Regulations*, INC. (Sept. 20, 2016), <https://www.inc.com/darren-heitner/why-nfl-agents-are-furious-with-new-regulations.html> [<https://perma.cc/5GGR-ARHA>].

<sup>196</sup> See REGULATIONS GOVERNING CONTRACT ADVISORS, *supra* note 74, at 8.

<sup>197</sup> See *id.* at 13.

<sup>198</sup> See *id.* at 16–18.

<sup>199</sup> See *id.* at 1–2. In other words, unlike the voluntary Registered Advisor Program, the Agent Certification Program is mandatory—i.e., only Certified Agents can represent players, and players can hire only Certified Agents. Though this is perhaps the most critical distinction between NFLPA Certification and Representation, misinformation persists: many players, reportedly—and at least one author of a law-review article, seemingly—remain unaware that players can hire financial advisors outside the Registration Program. See Darren Rovell (@darrenrovell), TWITTER (Apr. 6, 2017, 9:53 AM), <https://twitter.com/darrenrovell/status/850028715853709312> [<https://perma.cc/3E3V-7BXQ>] ("Many players are unaware that they can choose outside who is certified. This has been documented heavily."); Noam Silverman, *Regulation of Sports Agents and College Football: Perception or Reality?*, 7 FIU L. REV. 187, 198 n.95 (2011) (purporting erroneously that "there is a separate certification needed to become a financial advisor for an NFL Player").

<sup>200</sup> See Letter from NFL Players Ass'n, to Editor, ESPN (Oct. 3, 2012) [hereinafter Letter from NFL Players Ass'n], <https://web.archive.org/web/20121103082710/>

Program “a certified financial advisory program.”<sup>201</sup> In its letter, the NFLPA wrote:

Rovell has repeatedly lumped together Financial Advisors and Agents and described them as “certified.” NFLPA Registered Financial Advisors are not certified by the NFLPA[;] they are registered after meeting requirements and passing a background check. This is entirely different than the certification process for Certified Contract Advisors (agents). Rovell was made aware of this distinction, yet no correction has been issued. The correct information is available on the NFLPA website.<sup>202</sup>

The NFLPA has also proven willing to punish Registered Advisors who mischaracterize themselves as “Certified.” About a year ago, the *Austin American-Statesman* reported that,<sup>203</sup> in May 2017, the NFLPA had “immediately and indefinitely suspend[ed]” then-Registered Advisor Joseph Feste “with the intention of revoking [his] registration.”<sup>204</sup> Among other reasons for the suspension, the NFLPA contended that Feste:

- made a “false or misleading statement about [his] ability, degree, or area of competence in violation”<sup>205</sup> of what is now Section 5(II)(A)(9)<sup>206</sup> of the Code by “[i]mproperly claiming to be ‘NFLPA Certified’” on his firm’s website;<sup>207</sup>
- improperly suggested that he was endorsed by the NFLPA, a violation of what is now Section 5(II)(A)(11)<sup>208</sup> of the Code;<sup>209</sup> and

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<https://www.nflplayers.com/Articles/Public-News/Letter-to-the-Editor-ESPN/>  
[<https://perma.cc/8DK3-7Y5M>].

<sup>201</sup> See Rovell, *supra* note 186.

<sup>202</sup> Letter from NFL Players Ass’n, *supra* note 200.

<sup>203</sup> See Ryan Autullo, *NFL union split with Austin financial adviser in Drew Brees diamonds case*, AUSTIN AMERICAN-STATESMAN (Mar. 10, 2019), <https://www.statesman.com/news/20190310/nfl-union-split-with-austin-financial-adviser-in-drew-brees-diamonds-case> [<https://perma.cc/MHV8-WCWZ>].

<sup>204</sup> See Letter from Ned Ehrlich, Associate General Counsel, NFL Players Ass’n, to Joseph Feste (May 12, 2017) [hereinafter NFLPA Letter to Feste], <https://www.documentcloud.org/documents/5764652-1038-001.html> [<https://perma.cc/F83X-FVSR>].

<sup>205</sup> *Id.* (internal quotations omitted).

<sup>206</sup> See 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 17. See *infra* Section II.A.3, for Code Sections 5(II)(A)(9)’s definition. What is now Section 5(II)(A)(9) was then Section 4(II)(A)(9). See NFLPA Letter to Feste, *supra* note 204.

<sup>207</sup> See NFLPA Letter to Feste, *supra* note 204.

<sup>208</sup> See 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 17. See *infra* Section II.A.3, for Code Sections 5(II)(A)(11)’s definition. What is now Section 5(II)(A)(11) was then Section 4(II)(A)(11). See NFLPA Letter to Feste, *supra* note 204.

- engaged in the “[u]nauthorized inclusion and usage of the NFLPA logo” on his firm’s website, a violation of what is now Section 8<sup>210</sup> of the Code.<sup>211</sup>

At the same time, the fact that the NFLPA understands and appreciates the importance of the Certification-Registration distinction renders the union’s insufficient efforts to clarify this confusion all the more disappointing. For example, *Internet Archive* shows that Feste’s firm had both claimed to be “NFLPA Certified” and used the NFLPA logo on its website since at least November 2014.<sup>212</sup> Yet the NFLPA presumably did nothing until sending its May 2017 letter to Feste. Better (two-and-a-half years) late than never, to be sure. But the NFLPA should have uncovered this Code violation much earlier—not only because of Feste’s elite clientele,<sup>213</sup> but also because the NFLPA both mandates that Registered Advisors renew their application each year (requiring an annual background check)<sup>214</sup> and purports to “do due diligence checks on [Registered Advisors] on an ongoing basis.”<sup>215</sup>

Similar confusion, conflation, and mischaracterization seems to persist today. As of this writing, a Google search for the exact phrase “NFLPA certified financial” returned hundreds of results.<sup>216</sup> Second among these search results was the firm biography webpage of a financial advisor who

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<sup>209</sup> See NFLPA Letter to Feste, *supra* note 204. The union evidently based this charge on the fact that Feste claimed to be “NFLPA Certified,” on the fact that he used the NFLPA logo without permission, or both.

<sup>210</sup> See 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 19–20. See *infra* Section II.A.3, for Code Sections 8’s definition. What is now Section 8 was then Section 7. See NFLPA Letter to Feste, *supra* note 204.

<sup>211</sup> See NFLPA Letter to Feste, *supra* note 204.

<sup>212</sup> See *KM Core*, KM CAPITAL MGMT., <https://web.archive.org/web/20141107044707/http://kmcapitalmgt.com/km-advantage> [https://perma.cc/4XJ8-DT2V].

<sup>213</sup> See Autullo, *supra* note 203 (“Along with [Drew] Brees, who last season became the NFL’s all-time leader in passing yards, Feste represents many of the sport’s biggest names. Photos on his Instagram page show him with reigning NFL MVP Patrick Mahomes, past Super Bowl MVPs Nick Foles and Von Miller, veteran quarterback Matt Schaub and 2018 first-round draft pick Marcus Davenport. Most of the photos include captions indicating the players are Feste’s clients at KM Capital Management.”).

<sup>214</sup> See *Financial Advisor Renewal Applications*, NFLPA, <https://nflpa.com/financial-advisors/renewal-applications> [https://perma.cc/35JT-RLAL].

<sup>215</sup> See *How can the NFLPA’s financial advisor programs benefit me?*, *supra* note 126.

<sup>216</sup> See Search for “NFLPA certified financial”, GOOGLE, [https://www.google.com/search?q=%22NFLPA+certified+financial%22&rlz=1C1LOQA\\_enUS839US841&oq=%22&aqs=chrome.2.69i59j69i57j69i59l3.4127j0j7&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=%22NFLPA+certified+financial%22&rlz=1C1LOQA_enUS839US841&oq=%22&aqs=chrome.2.69i59j69i57j69i59l3.4127j0j7&sourceid=chrome&ie=UTF-8) [https://perma.cc/Q786-FDKY] (searching on Google for “NFLPA certified financial” with the quotation marks included).

holds himself out<sup>217</sup> not just as an “NFLPA Certified Financial Advisor” but as “the only NFLPA certified financial advisor in the state of Nevada.”<sup>218</sup> What is more, the financial advisor’s same web page also displays the NFLPA’s logo<sup>219</sup>—like Feste’s did<sup>220</sup>—presumably without the union’s permission.<sup>221</sup> Assuming this financial advisor is indeed a Registered Advisor, then, much like Feste, his firm biography webpage seems to violate Code Sections 5(II)(A)(9), 5(II)(A)(11), and 8.<sup>222</sup>

Likewise, third among these search results was the firm biography webpage of another financial advisor who also holds himself out<sup>223</sup> as “[a]n NFLPA-Certified Financial Advisor.”<sup>224</sup> Like Feste, this individual has reportedly advised elite clientele (such as Dak Prescott<sup>225</sup> who, as of this writing, is set to be the NFL’s fifth-highest paid player in 2020,<sup>226</sup> making over \$31.4 million in total cash). Again, if this financial advisor is indeed part of

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<sup>217</sup> Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm this individual’s current or past membership in the Registration Program.

<sup>218</sup> See *NFLPA Certified Financial Advisor*, BUDIN GROUP, <https://www.thebudin-group.com/nflpa-certified-financial-advisor> [<https://perma.cc/Z93S-CK5Z>].

<sup>219</sup> See *id.*

<sup>220</sup> See NFLPA Letter to Feste, *supra* note 204.

<sup>221</sup> This presumption stems from the implausibility of the NFLPA approving use of its logo or name on a webpage where one holds himself out as an “NFLPA Certified Financial Advisor.” After all, the union considers this a Code violation, per its 2017 letter to Joseph Feste. See NFLPA Letter to Feste, *supra* note 204.

<sup>222</sup> See *infra* Section II.A.3 for full definitions of Code Sections 5(II)(A)(9), 5(II)(A)(11), and 8.

<sup>223</sup> Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm this individual’s current or past membership in the Registration Program.

<sup>224</sup> See Peter J. Wright, DELPHI PRIVATE ADVISORS, <https://www.delphiprivate.com/team-members/peter-j-wright> [<https://perma.cc/FR95-D3LW>]; see also Peter J. Wright, LOURDMURRAY, <https://www.lourdmurray.com/peter-wright.html> [<https://perma.cc/SB5X-Z2JT>].

<sup>225</sup> See Jori Epstein, *Team-friendly deal? Dak Prescott explains why Cowboys shouldn't need to go that way*, USA TODAY (July 11, 2019, 2:31 PM), <https://www.usatoday.com/story/sports/nfl/cowboys/2019/07/11/dak-prescott-cowboys-contract-extension-team-friendly/1698941001/> [<https://perma.cc/2X2Z-N9TW>] (“Prescott hired CAA agent Todd France last summer {in 2018} to join a team that included NFLPA-certified agent Peter Miller and NFLPA-certified financial adviser Peter Wright.” (emphasis added)).

<sup>226</sup> See *NFL Salary Rankings*, SPOTRAC, <https://www.spotrac.com/nfl/rankings/cash/> [<https://perma.cc/2C5C-S2KG>].

the Registration Program, then his firm biography webpage seems to also violate Code Section 5(II)(A)(9) (and arguably 5(II)(A)(11) and 8, too).<sup>227</sup>

Finally, among the other results generated by this Google search include several sports-agency websites boasting of their expertise in helping clients hire “NFLPA certified” financial advisors<sup>228</sup> and episodes of “The Business of Sports Insider” podcast, which has often purported<sup>229</sup> to host a “NFLPA Certified Financial Advisor,”<sup>230</sup> who, in his April 30, 2019 appearance on the podcast, said “correct” when the podcast host described him as a financial advisor who is “certified through the NFLPA.”<sup>231</sup>

In sum, the Registration Program can give players a misleading sense of trust because it is so often mistaken for the more protective Certification Program. And the NFLPA has failed to mitigate this confusion by insuffi-

<sup>227</sup> See *infra* Section II.A.3 for full definitions of Code Sections 5(II)(A)(9), 5(II)(A)(11), and 8.

<sup>228</sup> See, e.g., *Financial Planning & Management*, PRO SOURCE SPORTS AGENCY, <https://www.prosourcesports.com/financial-planning> [<https://perma.cc/NT2S-NC9R>] (“ProSource Sports assist their clients in hiring a qualified *NFLPA certified financial management planner* to help clients establish a long term plan for their retirement and invest their money wisely.” (emphasis added)); *Services*, PFENNINGER REPRESENTATION GROUP, <https://www.prgagency.net/services> [<https://perma.cc/GHK9-GFX7>] (“For our NFL clients, we will help identify an *NFLPA certified financial advisor* to help with asset management.” (emphasis added)).

<sup>229</sup> Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm this individual’s current or past membership in the Registration Program.

<sup>230</sup> See, e.g., *The Business of Sports Insider: Paul Krumenacker (NFLPA Certified Financial Advisor) & Keith Kirkwood (New Orleans Saints WR)*, APPLE PODCASTS (Jan. 26, 2019), <https://podcasts.apple.com/us/podcast/paul-krumenacker-nflpa-certified-financial-advisor/id1445573918?i=1000428513837> [<https://perma.cc/HVP9-XQUM>]; *The Business of Sports Insider: Paul Krumenacker (Wealth Advisory Services) and Warren Schmidt (Pro Star Sports)*, APPLE PODCASTS (Dec. 3, 2018), <https://podcasts.apple.com/us/podcast/business-sports-insider-paul-krumenacker-wealth-advisory/id1445573918?i=1000425117889> [<https://perma.cc/DLS4-9PG8>] (“Colin Thompson, the host of the Business of Sports Insider, sits down with Paul Krumenacker (*NFLPA Certified Financial Advisor*) and Warren Schmidt (NFL Agent)” (emphasis added)). Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm this individual’s current or past membership in the Registration Program.

<sup>231</sup> See *The Business of Sports Insider: Paul Krumenacker – Wealth Advisory Services & NFLPA Certified Financial Advisor* at 1:09–1:22, APPLE PODCASTS (Apr. 30, 2019), <https://podcasts.apple.com/us/podcast/paul-krumenacker-wealth-advisory-services-nflpa-certified/id1445573918?i=1000436948171> [<https://perma.cc/EG8D-Z9ZW>]. Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm this individual’s current or past membership in the Registration Program.

ciently monitoring and correcting those who confuse, conflate, or mischaracterize the Registration and Certification Programs.

### 3. Credentializing NFLPA Registration

Even if the Certification-Registration distinction were clear to all, the mere existence of the Registration Program would still give Registered Advisors the chance to misleadingly “credentialize” their Registration—that is, to frame or exaggerate their inclusion in the Registration Program as a credential. Not only does this credentialization give players a misleading sense of trust, but it could also violate up to four Code provisions:

- Section 5(II)(A)(8), which prohibits Registered Advisors from “Providing false or misleading information to any Player, or concealing material facts from any Player, in the course of recruiting the Player as a client, or in the course of representing or consulting with that Player as a Registered Player Financial Advisor”;<sup>232</sup>
- Section 5(II)(A)(9), which prohibits Registered Advisors from “Making any false or misleading statement about his or her ability, degree, or area of competence”;<sup>233</sup>
- Section 5(II)(A)(11), which prohibits Registered Advisors from “Representing or suggesting to anyone that his/her status as a Registered Player Financial Advisor constitutes an endorsement or recommendation by the NFLPA of the Registered Player Financial Advisor, or his/her qualifications, or services”;<sup>234</sup> and
- Section 8, which prohibits Registered Advisors from using “the NFLPA’s name or likeness in any advertising or promotional material, without prior express written consent of the NFLPA.”<sup>235</sup>

Despite these Code provisions, past Registered Advisors have still credentialized their inclusion in the Registration Program. For example, according to 2017 SEC proceedings, Aaron Parthemer<sup>236</sup> and Sylvester King,<sup>237</sup> two formerly Registered Advisors and business partners who “participated in selling more than \$5 million of unregistered, illiquid securities

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<sup>232</sup> 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 17.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 19–20.

<sup>236</sup> See Aaron R. Parthemer, Respondent., Exchange Act Release No. 4756, 2017 WL 3634137 (Aug. 23, 2017).

<sup>237</sup> See Sylvester King, Jr., Respondent., Exchange Act Release No. 4757, 2017 WL 3634138 (Aug. 23, 2017).

to certain of [their] professional athlete brokerage customers and investment advisory clients,”<sup>238</sup> each:

[A]ctively marketed [their] status[es] as . . . registered NFLPA Advisor[s] when recruiting new NFL player advisory clients and serving current ones. [Their respective] business cards, email signature block[s], and marketing materials all highlighted [their respective] NFLPA Financial Advisor registration. The marketing materials contained internet addresses/links to the NFLPA website and invited . . . clients to verify [their respective] credentials. The NFLPA website contained, among other things, the NFLPA Code. The NFLPA Code provides that “[b]y joining the NFLPA Financial Advisor Registration Program, all financial advisors agree to abide by rules which are designed to both protect and inform players” and “[a] Registered Player Financial Advisor shall have the duty to act in the best interest of his/her Player-clients.” The NFLPA Code places importance on the special relationship between an NFLPA Advisor and a player by recognizing the advisor as a fiduciary to the player.<sup>239</sup>

Parthemer and King, according to the SEC, “had approximately 40 active or retired professional athletes as brokerage customers and/or investment advisory clients, most of whom [we]re members of the [NFLPA].”<sup>240</sup> Ultimately, among other violations, the SEC found that Parthemer and King “*willfully violated* Sections 206(1) and 206(2) of the Advisers Act, which *prohibit fraudulent conduct* by an investment adviser.”<sup>241</sup>

A quick online search confirmed that similar credentializing seems to persist as of this writing, at least among those holding themselves out as Registered Advisors (“Self-Described Registered Advisors”).<sup>242</sup> In particular, Self-Described Registered Advisors seem to credentialize their purported inclusion in the Registration Program in two main places: (a) their respective firm’s websites and (b) their personal LinkedIn profiles.

#### *a. Credentializing NFLPA Registration on Firm Websites*

Examples of ongoing credentialization on the respective firm websites of Self-Described Registered Advisors include:

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<sup>238</sup> Aaron R. Parthemer, *supra* note 236; Sylvester King, Jr., *supra* note 237.

<sup>239</sup> Aaron R. Parthemer, *supra* note 236; Sylvester King, Jr., *supra* note 237.

<sup>240</sup> Aaron R. Parthemer, *supra* note 236; Sylvester King, Jr., *supra* note 237.

<sup>241</sup> Aaron R. Parthemer, *supra* note 236 (emphasis added); Sylvester King, Jr., *supra* note 237 (emphasis added).

<sup>242</sup> Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm a given Self-Described Registered Advisor’s current or past membership in the Registration Program.

- In March 2019, one wealth-management firm issued a still-available press release stating that its “founding partner . . . has been formally *recognized* by the National Football League Players Association (NFLPA) as a Registered Player Financial Advisor,”<sup>243</sup> arguably violating Code Sections 5(II)(A)(8), 5(II)(A)(11), and 8.
- A second wealth-management firm, with at least one Self-Described Registered Advisor,<sup>244</sup> states on its website that “As a[n] NFLPA Registered Player Financial Advisor, we not only meet but *exceed the appropriate qualifications* to participate in the program,”<sup>245</sup> arguably violating Code Sections 5(II)(A)(8), 5(II)(A)(9), 5(II)(A)(11), and 8.
- A third wealth management firm, also with at least one Self-Described Registered Advisor,<sup>246</sup> holds itself out on its website as “an NFLPA Financial Advisor,”<sup>247</sup> arguably violating Code Sections 5(II)(A)(8) and 5(II)(A)(11). This same firm also uses the NFLPA’s logo<sup>248</sup>—presumably without the union’s permission,<sup>249</sup> like Feste’s firm reportedly did<sup>250</sup>—thus probably also violating Code Section 8.

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<sup>243</sup> See *CrossleyShear Wealth Management's Evan Shear Recognized as an NFL Players Association Registered Financial Advisor*, CROSSLEYSHEAR WEALTH MGMT. (Mar. 13, 2019) (emphasis added), <https://crossleyshear.com/crossleyshear-wealth-managements-evan-shear-recognized-as-an-nfl-players-association-registered-financial-advisor/> [<https://perma.cc/28AH-9UWK>].

<sup>244</sup> See *Home*, 2ND OPINION PARTNERS, <https://www.2ndpartners.com/> [<https://perma.cc/2MTT-ULHW>] (stating that the firm’s “Founding Partner . . . is an NFLPA Registered Player Financial Advisor with the NFL Players Association.”).

<sup>245</sup> See *NFLPA Registered Player Financial Advisor*, 2ND OPINION PARTNERS (emphasis added), <https://www.2ndpartners.com/nflpa-registered-financial-advisor/> [<https://perma.cc/G48A-L5T2>].

<sup>246</sup> See *NFL Players*, PROSPERWELL FINANCIAL, <https://prosperwell.com/nfl-players/> [<https://perma.cc/MVF6-H7G9>] (identifying one individual in particular as a Self-Described Registered Advisor).

<sup>247</sup> See *id.* (“As an *NFLPA Financial Advisor*, we offer a player centric approach with authenticity.” (emphasis added)). One could argue that holding oneself out *not* as an “NFLPA Registered Advisor” *but* as an “NFLPA Financial Advisor” suggests employment or some other NFLPA affiliation that is more substantial than inclusion in the Registration Program.

<sup>248</sup> See *id.* (displaying NFLPA logo).

<sup>249</sup> It seems implausible that the NFLPA would approve the use of its logo or name on a webpage where one claims to be not an “NFLPA Registered Advisor”—but an “NFLPA Financial Advisor”—the latter of which suggests employment or some other NFLPA affiliation that is more substantial than inclusion in the Registration Program.

<sup>250</sup> See NFLPA Letter to Feste, *supra* note 204.

- Likewise, another individual holds himself out<sup>251</sup> on his firm's website as an "NFLPA® financial advisor,"<sup>252</sup> again, arguably violating Code Sections 5(II)(A)(8), 5(II)(A)(11), and 8.
- As a final example, yet another individual holds himself out<sup>253</sup> as "a member of the NFL Players Association (NFLPA),"<sup>254</sup> arguably violating Code Sections 5(II)(A)(8), 5(II)(A)(11), and 8. This same individual then adds that this "NFLPA credential includes an *exclusive list of financial advisors* across the country who have *access to the NFL association*,"<sup>255</sup> perhaps independently violating Code Sections 5(II)(A)(8) and 5(II)(A)(11). Moreover, characterizing the Registration Program as "exclusive" is inherently problematic, given that a key premise on which the SEC issued its No-Action Letter was that the NFLPA use eligibility criteria that "are *not* highly selective"<sup>256</sup> because "highly selective" criteria would be less likely to lead to "a broad cross-section and large number of [Registered Advisors]."<sup>257</sup>

All in all, given the high likelihood that a player would visit the website of a prospective financial advisor's firm to gather initial information, and given that a Registered Advisor's website address is one of the few pieces of information on the NFLPA's password-protected list,<sup>258</sup> it stands to reason that such Registration credentialization could facilitate a misleading sense of trust among players.

#### *b. Credentializing NFLPA Registration on LinkedIn*

Equally problematic is Self-Described Registered Advisors credentializing their inclusion in the Registration Program on LinkedIn. For instance,

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<sup>251</sup> Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm this individual's current or past membership in the Registration Program.

<sup>252</sup> See *The Seiler Group of Raymond James*, RAYMOND JAMES, [https://www.raymondjames.com/theseilergroup/about\\_us.htm](https://www.raymondjames.com/theseilergroup/about_us.htm) [<https://perma.cc/6FTK-YWAZ>].

<sup>253</sup> Because the NFLPA password-protects its list of Registered Advisors, no publicly available source could confirm this individual's current or past membership in the Registration Program.

<sup>254</sup> *Michael H. Olivia, CFP® CExP™*, WESTPAC WEALTH PARTNERS, <https://www.westpacwealth.com/team/michael-h-olivia-cfp-cexp> [<https://perma.cc/GRY3-DDYN>].

<sup>255</sup> *Id.* (emphasis added).

<sup>256</sup> SEC No-Action Letter to NFLPA, *supra* note 17, at \*6 (emphasis added).

<sup>257</sup> *Id.*

<sup>258</sup> See *How do I find a qualified financial advisor on the NFLPA's website?*, NFLPA, <https://nflpa.com/active-players/faq/how-do-i-find-a-qualified-financial-advisor-on-the-nflpas-website> [<https://perma.cc/V9V7-NQYP>].

as of this writing, at least seven Self-Described Registered Advisors include some variation of the title “NFLPA Registered Financial Advisor” in the work experience section of their publicly available LinkedIn profiles.<sup>259</sup> This misleadingly suggests employment, rather than Registration, with the NFLPA, arguably violating Code Sections 5(II)(A)(8), 5(II)(A)(11), and 8.<sup>260</sup>

This unforced error is particularly ironic because LinkedIn profiles specifically feature at least two designated spaces where one could more appropriately identify his or her inclusion in the Registration Program: the “Organizations” section, as well as the “Licenses & Certifications” section. As the popular “For Dummies” series explains, the “Organizations” section of LinkedIn profiles represents:

[T]he place to record the real-world associations and clubs to which you belong. Listing professional membership organizations on your profile proves you are . . . an involved member within your industry. . . . To determine the organizations to list in your profile, answer the following questions: Do you belong to any industry organizations? Do you belong to any user groups? Are you a member of a networking group? Do you pay dues to any association? Are you a part of a local government organization? Do you sit on a board of directors?<sup>261</sup>

Alternatively, one could identify his or her inclusion in the Registration Program in the “Licenses & Certification” section. Though the title of the section risks exacerbating the pervasive confusion surrounding the Certification-Registration distinction,<sup>262</sup> using the “Licenses & Certification” section is still far more appropriate than suggesting employment with the NFLPA. And it is not as if nobody uses the “Organizations” or “Licenses & Certifications” profile sections on LinkedIn. For example, of the seven individuals whose LinkedIn pages suggest employment with the NFLPA as a Registered Financial Advisor,<sup>263</sup> four already list information in their “Organizations” section, and four list information in their “Licenses & Certifications” section.<sup>264</sup>

<sup>259</sup> Publicly available LinkedIn Profile records on file with author.

<sup>260</sup> See 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 17, 19–20. On LinkedIn, when a user adds a position with the NFLPA under work experience, the NFLPA’s logo seems to then automatically display. Publicly available LinkedIn Profile records on file with author.

<sup>261</sup> DONNA SERDULA, LINKEDIN PROFILE OPTIMIZATION FOR DUMMIES 163–64 (2017).

<sup>262</sup> See *supra* Section II.A.2.

<sup>263</sup> Publicly available LinkedIn Profile records on file with author.

<sup>264</sup> Publicly available LinkedIn Profile records on file with author.

On balance, using LinkedIn to credentialize one's purported Registered Advisor status (and NFLPA affiliation) seems particularly likely to give players a misleading sense of trust: not only because it suggests employment with the NFLPA but also because of LinkedIn's present-day ubiquity. Indeed, for six of the seven individuals, a Google search of their first name, last name, and "financial advisor" (for example, "John Doe Financial Advisor"), generated their LinkedIn profile as the second, third, or fourth non-advertisement result.<sup>265</sup> It is thus easy to imagine a scenario where a player ends up looking at a potential financial advisor's LinkedIn and gaining a misleading sense of trust from the misrepresentation that the NFLPA is the potential advisor's employer.

Despite the risk of players gaining a misleading sense of trust from LinkedIn credentialization, the NFLPA has either failed to monitor such misrepresentations or simply made little effort to correct them. Either is hard to justify. In terms of monitoring, because the NFLPA maintains its own publicly available LinkedIn "company page," which is followed by over 40,000 LinkedIn users and automatically maintains a list of all its "employees,"<sup>266</sup> it would require little effort to detect seven individuals holding themselves out on LinkedIn as Registered Advisors *employed with* the NFLPA.<sup>267</sup> And in terms of corrective action, the NFLPA could simply ask the seven individuals to fix their profiles,<sup>268</sup> bring disciplinary proceedings

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<sup>265</sup> Records of the first page of results for each of these seven Google searches are on file with author.

<sup>266</sup> Publicly available NFLPA LinkedIn Page records on file with author.

<sup>267</sup> As Sun River IT Partners, a technology services company, explains on their website: "When LinkedIn members add or edit a position on their profile, they specify the company they work for. If they select your company from the LinkedIn list, the employee will automatically show up on your Company Page." *See How to Remove Rogue Employee Profiles from Your LinkedIn Company Page*, SUN RIVERS IT PARTNERS, <https://www.sunriverit.com/how-to-remove-rogue-employee-profiles-from-your-linkedin-company-page/> [<https://perma.cc/4QWP-Y3K8>].

<sup>268</sup> A closer look into the seven Self-Described Registered Advisors whose public LinkedIn profiles suggest employment with the NFLPA yielded—for three of the seven individuals—relevant information ranging from substantial red flags to a minor disclosure:

- Most relevantly, one Self-Described Registered Advisor has been the subject of two FINRA customer complaints: an ultimately denied claim from 2005, and a pending \$10 million claim from retired NFL defensive end Charles Johnson, who "allege[d] that the [advisor]" both "recommended risky and unsuitable investments in various outside business ventures where his wife was a partial owner in janitorial businesses, second hand clothing stores, hair cut establishments, housing developments and venture capital enterprises. . . . [and] . . . diverted funds from these outside invest-

under the Code (assuming that the individuals are, indeed, current participants in the Registration Program), or contact LinkedIn directly to remedy the issue through the website's page specifically dedicated to explaining how to report inaccurate employment, aptly titled "Removing People from a LinkedIn Page."<sup>269</sup>

#### 4. Counterproductive Compliance: Botched Background Checks, Misleading Monitoring, and Perverse Policy

Finally, the NFLPA has repeatedly failed to execute on the Registration Program's core function: ensuring not only that applicants meet the Code's minimum requirements,<sup>270</sup> but also that, once in the Registration Program, they maintain ongoing compliance with those requirements.<sup>271</sup> In any event, even if the NFLPA had successfully executed on its core function over the years, the Code's compliance program would still be fundamentally flawed because of perverse underlying policy that prohibits the NFLPA from informing players about Registered Advisors' non-disqualifying red flags.<sup>272</sup>

##### *a. Botched Pre-Registration Background Checks*

As mentioned, applicants to the Registration Program must pass a background check before becoming a Registered Advisor.<sup>273</sup> Yet several

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ments and accounts for their personal gain." See BROKERCHECK REPORT: CRD # 1777599, FINRA 11-14, [https://files.brokercheck.finra.org/individual/individual\\_1777599.pdf](https://files.brokercheck.finra.org/individual/individual_1777599.pdf) [<https://perma.cc/73D2-EWN9>]; see also Chase Carlson (@ChaseACarlson), TWITTER (May 11, 2020, 1:59 PM), <https://twitter.com/ChaseACarlson/status/1259951229402255360> [<https://perma.cc/9KHQ-B2XB>] (identifying "[f]ormer NFL DE Charles Johnson" as the customer who filed the complaint).

- A second Self-Described Registered Advisor was once reportedly (i) charged with several crimes (including burglary) and (ii) convicted on simple-assault charges. See Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 9:14 AM), <https://twitter.com/ChaseACarlson/status/790587388200382464> [<https://perma.cc/9ETE-HVLS>]; *infra* Section II.A.4.c.
- A third Self-Described Registered Advisor's FINRA BrokerCheck report includes a disclosure from 2014. See BROKERCHECK REPORT: CRD# 2268259, FINRA 9, [https://files.brokercheck.finra.org/individual/individual\\_2268259.pdf](https://files.brokercheck.finra.org/individual/individual_2268259.pdf), [<https://perma.cc/9ZE5-35DT>].

<sup>269</sup> See *Removing People from a LinkedIn Page*, LINKEDIN, <https://www.linkedin.com/help/linkedin/answer/1589> [<https://perma.cc/X7LK-7VMS>].

<sup>270</sup> See *infra* Section II.A.4.a.

<sup>271</sup> See *infra* Section II.A.4.b.

<sup>272</sup> See *infra* Section II.A.4.c.

<sup>273</sup> See *Apply to Be a Financial Advisor*, *supra* note 83.

NFL players, reportedly, have been victimized by Registered Advisors whose backgrounds never should have passed muster, such as

- Kurt Barton—“who ran a \$50 million Ponzi scheme” and “swindled money from [several] Philadelphia Eagles” players—yet never earned a bachelor’s degree, as required by the Registration Program;<sup>274</sup>
- Sylvester King, who, according to the SEC, sold \$5 million of unregistered, illiquid securities to his client base comprising 40 current or former professional athletes,<sup>275</sup> reportedly also never earned a bachelor’s degree as required by the Registration Program;<sup>276</sup>
- Ash Narayan, who reportedly “robbed” \$33 million from clients, including \$7.8 million from quarterback Mark Sanchez alone, was approved for and remained in the Registration Program until 2016 despite,<sup>277</sup> according to the SEC, “[h]e [himself] out as a Certified Public Accountant (“CPA”) even though he is not and never has been a CPA”;<sup>278</sup>

<sup>274</sup> See Rovell, *supra* note 186.

<sup>275</sup> See Sylvester King, Jr., *supra* note 237.

<sup>276</sup> See Carlson, *supra* note 171.

<sup>277</sup> See Ahiza Garcia, *Jake Peavy and Mark Sanchez ripped off in \$33 million scheme*, CNN (June 22, 2016), <https://money.cnn.com/2016/06/22/news/ponzi-scheme-ash-narayan-sanchez-peavy/index.html> [<https://perma.cc/YAB4-S5WG>] (“Jake Peavy and Mark Sanchez are just two of the pro athletes robbed in a \$33 million Ponzi-like scheme. Ash Narayan is being investigated by the SEC for ‘secretly siphoning millions of dollars’ from the athletes’ accounts ‘using forged or unauthorized signatures.’ . . . Among the documents in the SEC’s lawsuit was a ledger that contained a list of athletes and how much they lost[, which included] . . . Denver Broncos quarterback Mark Sanchez[, who lost] \$7.8 million.”); Nathaniel Vinton, *NFLPA cuts ties with Ash Narayan who’s accused of stealing more than \$30M from pro athletes*, N.Y. DAILY NEWS (June 22, 2016), <https://www.nydailynews.com/sports/football/nflpa-cuts-ties-adviser-accused-stealing-athletes-article-1.2684133> [<https://perma.cc/925L-RG4Y>] (suggesting that Narayan remained in the Registration Program until June 2016 by writing: “The NFLPA notified agents Wednesday it had immediately suspended Narayan, who was charged by the Securities and Exchange Commission with defrauding the former Jets quarterback and other pro ballplayers.”).

<sup>278</sup> First Amended Complaint, SEC v. Narayan, No. 3:16-cv-1417-M, 2018 WL 1210809 (N.D. Tex. Jan. 4, 2018) (“Narayan’s clients trusted him—not only because of their fiduciary relationship, but also because of his professional qualifications and experience. Narayan knowingly or recklessly represented to these clients that he was a certified public accountant (“CPA”). For instance, *both his . . . email signature block and his letterhead* [at RGT, Narayan’s employer since 1997, before the advent of the NFLPA Financial Advisor Registration Program] read ‘Ash Narayan, J.D., CPA.’ His claim that he was a CPA boosted Narayan’s credibility. It served as

- Nelson “Keith” Bond, who reportedly was “responsible for players . . . losing roughly \$20 million” in a Ponzi scheme, became a Registered Advisor even though one investment-fraud attorney’s investigation “could not find any investment licenses for Bond,” suggesting he lacked the financial training and licensing required by the Registration Program.<sup>279</sup>

And these examples represent only the reportedly unqualified Registered Advisors who have been exposed through public proceedings.<sup>280</sup> Because experts estimate that most fraud suffered by professional athletes likely goes undetected or unreported,<sup>281</sup> the NFLPA might well have approved other unqualified applicants who have managed to remain unexposed by

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a basis on which his clients . . . believed he was capable of managing their money conservatively and in accordance with the law. *In reality, however, Narayan is not—and never has been—a CPA.*” (emphasis added)); see also Aaron Gordon, *NFLPA Approved Financial Advisor Stole \$30 Million From Mark Sanchez, Jake Peavy, and Roy Oswalt*, VICE (June 21, 2016), [https://www.vice.com/en\\_us/article/9apv38/nflpa-approved-financial-advisor-stole-30-million-from-mark-sanchez-jake-peavy-and-roy-oswalt](https://www.vice.com/en_us/article/9apv38/nflpa-approved-financial-advisor-stole-30-million-from-mark-sanchez-jake-peavy-and-roy-oswalt) [<https://perma.cc/F6KP-XQSD>] (“Despite being a registered financial advisor in the NFLPA database, he did not hold a CPA, although he claimed to have one in his email signature.”).

<sup>279</sup> See Carlson, *supra* note 171; see also SEC No-Action Letter to NFLPA, *supra* note 17, at \*2 (“Any financial advisor must be legally authorized to engage in his or her profession. Any person or entity that provides Broker, Dealer, Investment Advisory, Financial Planning, insurance, tax, accounting, and/or legal functions that should be, but is not, registered with the SEC, and/or licensed by appropriate state jurisdictions, is not eligible to be a Registered Player Financial Advisor. Any person or entity that performs any of the above-described functions and is exempt from such registration and/or licensing is also not eligible to be a Registered Player Financial Advisor.” (emphasis added)).

<sup>280</sup> See Press Release, U.S. Attorney’s Office for the Western District of Texas, Triton President and CEO Kurt Barton Sentenced to Federal Prison (Nov. 4, 2011), <https://archives.fbi.gov/archives/sanantonio/press-releases/2011/triton-president-and-ceo-kurt-barton-sentenced-to-federal-prison> [<https://perma.cc/U8QS-QA98>] (announcing Kurt Barton’s federal conviction on dozens of counts of fraud, leading to his seventeen-year prison sentence); Sylvester King, Jr., *supra* note 237 (finding that Sylvester King, Jr. “willfully violated Sections 206(1) and 206(2) of the Advisers Act, which prohibit fraudulent conduct by an investment adviser”); Ash Narayan, Respondent, Exchange Act Release No. 79991, 2017 WL 526392 (Feb. 8, 2017) (announcing settlement with Ash Narayan, which, among other things, bars him from practicing as an accountant or lawyer before the SEC); Amended Complaint, *supra* note 157, ¶¶ 1–2, (alleging \$20 million in losses after investing with Nelson “Keith” Bond and his business partner, Kirk Wright).

<sup>281</sup> See SPIEGELHALTER & SILVERTOWN, *supra* note 140, at 2 (“[F]rom 2004 through 2018, professional athletes alleged almost \$600 million in fraud-related loss. *In light of the difficulty in detecting fraud and the reluctance of victims to acknowledge it publicly, that’s likely not the half of it.*” (emphasis added)).

avoiding union, regulatory, and public scrutiny. In short, the Registration Program's propensity to botch background checks can give players a misleading sense of trust. Indeed, players would be much more likely to vet Registered Advisors if they believed that the NFLPA had *not* already thoroughly done so and consequently issued its seal of approval.

*b. Misleading Monitoring*

The NFLPA's failure to enforce the Code's minimum requirements is not limited to negligence when registering first-time applicants; the NFLPA has also failed to sufficiently monitor participants' compliance with the Code after accepting them into the Registration Program. For example, in 2004, NFL player Johnny Rutledge brought a Financial Industry Regulatory Authority ("FINRA")<sup>282</sup> customer complaint against the above-mentioned Jeff Rubin (of Alabama Bingo infamy) for "forging signatures on . . . Rutledge's life insurance application,"<sup>283</sup> allegedly costing Rutledge \$119,000.<sup>284</sup> Rubin ultimately paid Rutledge \$40,000 to settle the dispute. But the NFLPA never notified their player-members about this,<sup>285</sup> even though the settlement was publicly available and Rutledge "didn't stay quiet" and "warned other . . . former NFL players about Rubin."<sup>286</sup> And this settlement with Rutledge was hardly the only red flag that arose while Rubin was a Registered Advisor. In April 2008, the month after Rubin started recruiting player-clients to invest in the Alabama electronic-Bingo operation,<sup>287</sup> the IRS imposed a tax lien against Rubin for \$440,000.<sup>288</sup> At the time, he was already "underwater on his \$3 million house"<sup>289</sup> amid a

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<sup>282</sup> "FINRA is the largest self-regulatory organization that is authorized by Congress with protecting investors in the United States." Mark Egan, Gregor Matvos & Amit Seru, *The Market for Financial Adviser Misconduct*, 127 J. OF POL. ECON. 233, 233 n.1 (2019).

<sup>283</sup> Chase Carlson (@ChaseACarlson), TWITTER (Oct. 23, 2016, 5:38 PM), <https://twitter.com/ChaseACarlson/status/790351811488149504> [<https://perma.cc/KL52-RW5B>].

<sup>284</sup> Cole & Getlin, *supra* note 172.

<sup>285</sup> Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 9:23 AM), <https://twitter.com/chaseacarlson/status/790589533398134784> [<https://perma.cc/DB7A-7Q63>].

<sup>286</sup> Donna Gehrke-White, *Ex-NFL player Rutledge tells how he warned players about Broward financial adviser*, SUN SENTINEL (Mar. 28, 2013), <https://www.sun-sentinel.com/business/fl-xpm-2013-03-28-fl-nfl-rutledge-20130326-story.html> [<https://perma.cc/FG7E-LKHV>].

<sup>287</sup> Cole & Getlin, *supra* note 172.

<sup>288</sup> Keteyian, *supra* note 167.

<sup>289</sup> *Id.*

collapsing real estate market and global economy.<sup>290</sup> But Rubin's player-clients remained unaware of his crumbling personal finances,<sup>291</sup> even though (i) IRS tax liens are matters of public record,<sup>292</sup> (ii) the Code disqualified individuals "generally unable to pay [their] debts" from the Registration Program,<sup>293</sup> and (iii) the NFLPA had pledged to "monitor the compliance of [R]egistered [A]dvisors with the [Registration] Program's eligibility requirements and regulations."<sup>294</sup>

Altogether, it seems that the NFLPA probably never knew about Rubin's red flags, which suggests that the union maintained insufficient monitoring processes. Had the NFLPA alerted players about Rubin's red flags—or, better yet, banned Rubin from the Registration Program—players would have known about Rubin's exploitative tendencies and crumbling personal finances before collectively committing tens of millions of dollars to an electronic-Bingo investment that, as it turns out, was already \$41 million in the red when Rubin began recruiting his player-clients as investors.<sup>295</sup> Said differently, had the NFLPA and its Registration Program just done what it purports to do, the union could have mitigated, or altogether prevented, the tens of millions of dollars in losses incurred by the NFL players who invested with Rubin.

But perhaps most discouraging is the NFLPA's apparent failure to learn from these mistakes. A decade after the NFLPA failed to inform players about Rutledge's settlement with Rubin, the NFLPA continued to monitor insufficiently its Registered Advisors' compliance with the Code. For example, as of October 2016, the NFLPA's password-protected list of Registered Advisors included several individuals who no longer should have ap-

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<sup>290</sup> See generally Kimberly Amadeo, *2008 Financial Crisis Timeline*, BALANCE (Nov. 20, 2019), <https://www.thebalance.com/2008-financial-crisis-timeline-3305540> [<https://perma.cc/J4BN-WLGT>].

<sup>291</sup> See Ryan Williamson, *Fred Taylor, other prominent NFL players say they lost \$43 million thanks to financial adviser*, COMEBACK (Oct. 25, 2016), <https://thecomeback.com/nfl/fred-taylor-other-prominent-nfl-players-say-they-lost-43-million-thanks-to-financial-adviser.html> [<https://perma.cc/48L6-7QKL>] ("Rubin wanted the players to invest in electronic bingo . . . [But l]ittle did the players know that Rubin was in a bad financial situation and was doing this to try and overcome other financial problems. . . . [And a]side from not disclosing his financial problems, Rubin failed to inform the investors of the risks that came along with this investment.").

<sup>292</sup> See *Understanding a Federal Tax Lien*, U.S. INTERNAL REVENUE SERVICE, <https://www.irs.gov/businesses/small-businesses-self-employed/understanding-a-federal-tax-lien>, [<https://perma.cc/D97A-WY9Q>].

<sup>293</sup> SEC No-Action Letter to NFLPA, *supra* note 17, at \*11.

<sup>294</sup> *Id.* at \*20.

<sup>295</sup> Cole & Getlin, *supra* note 172.

peared there. Indeed, that list included one Registered Advisor whose broker and investment-advisor licenses, at least one of which was required to remain in the Registration Program, had expired more than six weeks earlier,<sup>296</sup> and, worse still, another whose broker and investment-advisor licenses had expired about nine months earlier.<sup>297</sup> This same list even included a Registered Advisor who had tragically died in a widely reported plane accident in March 2016, more than seven months earlier.<sup>298</sup> We simply cannot know how long the NFLPA would have included these individuals on its list of Registered Advisors had *60 Minutes* not rhetorically asked on national television: “how vigilant can the [NFLPA] be in monitoring its [Registered Advisors] when Kevin Carreno is still listed on its online directory” despite having died “in a plane crash seven months ago[?]”<sup>299</sup>

It is again self-evident here how the NFLPA’s promises to monitor Registered Advisors’ compliance with the Code can give players a mislead-

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<sup>296</sup> Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 6:42 AM), <https://twitter.com/chaseacarlson/status/790549106938839040> [<https://perma.cc/5VWL-C93C>] (establishing that Registered Advisor remained in Registration Program as of October 24, 2016 yet no longer maintained his broker’s license); BROKERCHECK REPORT: CRD # 3221193, FINRA 2, 4 (2020), [https://files.brokercheck.finra.org/individual/individual\\_3221193.pdf](https://files.brokercheck.finra.org/individual/individual_3221193.pdf) [<https://perma.cc/QV4T-6W9D>] (establishing that Registered Advisor’s broker license expired in September 2016 and was not renewed until April 2017); INVESTMENT ADVISER PUBLIC DISCLOSURE: CRD # 3221193, U.S. SEC. & EXCHANGE COMM’N 1 (2020), [https://reports.adviserinfo.sec.gov/reports/individual/individual\\_3221193.pdf](https://reports.adviserinfo.sec.gov/reports/individual/individual_3221193.pdf) [<https://perma.cc/4E9M-H79P>] (establishing that Registered Advisor’s investment adviser license expired on September 8, 2016).

<sup>297</sup> Carlson, *supra* note 296 (establishing that Registered Advisor remained in Registration Program as of October 24, 2016 yet no longer maintained his broker’s license); BROKERCHECK REPORT: CRD # 3115604, FINRA 1 (2020), [https://files.brokercheck.finra.org/individual/individual\\_3115604.pdf](https://files.brokercheck.finra.org/individual/individual_3115604.pdf) [<https://perma.cc/WK32-9229>] (establishing that Registered Advisor’s broker license expired in January 2016); INVESTMENT ADVISER PUBLIC DISCLOSURE: CRD # 3115604, U.S. SEC. & EXCHANGE COMM’N 1 (2020), [https://reports.adviserinfo.sec.gov/reports/individual/individual\\_3115604.pdf](https://reports.adviserinfo.sec.gov/reports/individual/individual_3115604.pdf) [<https://perma.cc/HR8T-3VAR>] (establishing that Registered Advisor’s investment adviser license also expired in January 2016 and was not renewed until October 2019).

<sup>298</sup> Chase Carlson (@ChaseACarlson), TWITTER (Oct. 23, 2016, 5:23 PM), <https://twitter.com/ChaseACarlson/status/790348002594619393> [<https://perma.cc/R93J-L6UU>] (establishing that Registered Advisor remained in Registration Program as of October 23, 2016); *see, e.g.*, Margie Manning, *Former FINRA governor, executive at Raymond James one of two killed in Friday’s plane crash*, TAMPA BAY BUS. J. (Mar. 21, 2016), <https://www.bizjournals.com/tampabay/news/2016/03/21/former-finra-governor-executive-at-raymond-james.html> (providing example of press coverage around fatal plane crash).

<sup>299</sup> Keteyian, *supra* note 167.

ing sense of trust: the NFLPA causes players to reasonably assume that the union not only thoroughly vets Registration Program applicants, but also continues to monitor such applicants' compliance with the Code once admitted into the Registration Program as Registered Advisors.

*c. Perverse Policy*

The Registration Program also maintains a questionable approach to handling cases in which an applicant's background check both meets the Code's eligibility requirements and simultaneously raises potential red flags. Problematically, the NFLPA neither informs players of such non-disqualifying red flags nor offers any distinctions among the broad spectrum of "passing" background checks.

Indeed, consider the case of former Registered Advisor Kirk Wright. Even though Wright's Registration Program background check showed (i) two recently released federal tax liens against him totaling over \$400,000, (ii) two prior civil judgments against him totaling over \$20,000, and (iii) a pair of non-fraud-related criminal counts, the Code's eligibility requirements did not disqualify him from the Registration Program.<sup>300</sup>

And that the NFLPA allegedly failed to inform players about Wright's non-disqualifying red flags<sup>301</sup> should not surprise anyone who has read the SEC's No-Action Letter to the NFLPA: as mentioned, this letter hinged on several critical stipulations, including that the union would neither recommend nor "advise players as to the merits or shortcomings of any particular" Registered Advisor, "other than indicating whether a [Registered Advisor]

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<sup>300</sup> See *Atwater v. Nat'l Football League Players Ass'n*, Civ. A. No. 1:06-CV-1510-JEC, 2009 WL 3254925, at \*2 n.2 (N.D. Ga. Mar. 27, 2009), *aff'd*, 626 F.3d 1170 (11th Cir. 2010) ("The 2005 background check on Wright reported two federal tax liens in the amounts of \$383,680 and \$20,605, which were released as of November 1, 2004, and November 21, 2002 respectively. It also reflected two civil judgments in the amounts of \$11,132 and \$10,944, a judgment for \$.80, and a state tax lien against IMA for \$2,088. There were also two criminal counts against Wright, both of which were misdemeanors and unrelated to fraud, *which were not disqualifiers for the Program.*" (citations omitted) (emphasis added)); *id.* at \*2 ("A review of their records revealed a number of tax liens and civil judgments against Wright and Bond. However, *existence of these liens and judgments would not automatically disqualify an applicant from registration in the Program*, and almost all of the liens were released." (citations omitted) (emphasis added)).

<sup>301</sup> See Amended Complaint, *supra* note 157, ¶ 77 ("Had Plaintiffs been aware of any of these 'red flag' issues [e.g., tax liens], they would not have invested their monies with Wright . . . .").

has been subject to disciplinary action for violating” the Code.<sup>302</sup> In other words, the NFLPA probably could not have informed its player-members about Wright’s discomfoting-but-not-disqualifying red flags without sidestepping the No-Action Letter it received from the SEC.

This perverse policy is perhaps the Code’s fundamental flaw. For instance, in Wright’s case, the Registration Program—on some level—worked as designed: the NFLPA’s 2005 background check on Wright successfully uncovered red (albeit non-disqualifying) flags.<sup>303</sup> But the Registration Program still failed: Wright perpetrated a \$150 million Ponzi scheme for which he was ultimately “convicted . . . of 47 counts of fraud and money laundering.”<sup>304</sup> And among Wright’s defrauded victims were six retired NFL players, who collectively lost \$20 million investing in the Ponzi scheme.<sup>305</sup> Facing a prison sentence of up to 710 years, Wright hung himself in his jail cell before receiving his sentence.<sup>306</sup>

Unfortunately, the fundamental flaw that prohibited the NFLPA from disclosing Kirk Wright’s non-disqualifying red flags to players remains an issue today. For example, as of October 2016, the Registration Program reportedly included Registered Advisors who, allegedly, had been:

- both (i) convicted of a felony drug conspiracy charge and (ii) suspended by a state regulatory agency for making a misrepresentation on an application for a license to sell financial products;<sup>307</sup>
- both (i) charged with crimes including burglary, aggravated assault, reckless endangerment, terroristic threats, criminal conspiracy, and criminal trespassing and (ii) convicted of simple assault;<sup>308</sup>

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<sup>302</sup> SEC No-Action Letter to NFLPA, *supra* note 17, at \*6; *see supra* Section I.A.2.b.

<sup>303</sup> *See* Atwater v. Nat’l Football League Players Ass’n, Civ. A. No. 1:06-CV-1510-JEC, 2009 WL 3254925, at \*2 n.2 (N.D. Ga. Mar. 27, 2009), *aff’d*, 626 F.3d 1170 (11th Cir. 2010).

<sup>304</sup> Tierney, *supra* note 61.

<sup>305</sup> *See id.*

<sup>306</sup> *See id.*

<sup>307</sup> *See* Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 6:32 AM), <https://twitter.com/ChaseACarlson/status/790546431136395264> [<https://perma.cc/8PQL-NSNX>] (establishing that this “current NFLPA registered financial advisor, has a felony drug conviction and suspension by the Florida Department of Insur[ance]”); BROKERCHECK REPORT: CRD # 2026394, FINRA 9–12, [https://files.brokercheck.finra.org/individual/individual\\_2026394.pdf](https://files.brokercheck.finra.org/individual/individual_2026394.pdf) [<https://perma.cc/3PWK-YHKK>] (providing more details about the two disclosures on the Registered Advisor’s record).

<sup>308</sup> *See* Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 9:14 AM), <https://twitter.com/ChaseACarlson/status/790587388200382464> [<https://perma.cc/9ETE-HVLS>].

- both (i) fired from his previous employer for “not disclosing private securities transactions, including transactions alongside clients, and not being forthcoming during an initial review”<sup>309</sup> and (ii) named co-defendant in a then-pending arbitration complaint filed by FINRA’s Department of Enforcement alleging he invested in several private companies without his firm’s approval, including one investment where the firm had instructed him not to invest;<sup>310</sup>
- both (i) fired from his previous employer for violating the firm’s annuity policy and (ii) accused in a FINRA customer complaint of selling a client an unsuitable annuity;<sup>311</sup>
- both (i) held jointly and severally liable (along with his firm) at arbitration for \$50,000 in damages stemming from a FINRA customer complaint where a client alleged, among other things, fraud, violation of federal and state securities laws, breach of fiduciary duty, and breach of contract<sup>312</sup> and (ii) named in five other FINRA customer complaints;<sup>313</sup> and
- named in ten FINRA customer complaints from 1999 to 2014.<sup>314</sup>

Again, though all of this non-disqualifying conduct raises red flags, were the NFLPA to disclose such red flags to prospective player-clients, it would risk

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<sup>309</sup> Chase Carlson, *New NFLPA Registered Financial Advisor Is The Subject of a FINRA Disciplinary Proceeding*, CARLSON-LAW.NET (Mar. 31, 2017), <https://www.carlson-law.net/new-nflpa-registered-financial-advisor-is-the-subject-of-a-finra-disciplinary-proceeding/> [<https://perma.cc/WK37-JM5V>].

<sup>310</sup> Though the case was likely pending when the NFLPA approved this Registered Advisor into the Program, FINRA ultimately suspended and fined this Registered Advisor \$25,000 in August 2017. *See* Dep’t of Enforcement v. Brown, No. 2014042690502, 2017 FINRA Discip. LEXIS 36, at \*5; *see also* Carlson, *supra* note 309 (“It appears that [he] became registered with the NFLPA as a financial advisor while [this] FINRA Disciplinary Proceeding was pending.”).

<sup>311</sup> *See* Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 6:32 AM), <https://twitter.com/chaseacarlson/status/790546463176663040> [<https://perma.cc/UYL8-JLL7>]; BROKERCHECK REPORT: CRD # 2352216, FINRA 8–10, [https://files.brokercheck.finra.org/individual/individual\\_2352216.pdf](https://files.brokercheck.finra.org/individual/individual_2352216.pdf) [<https://perma.cc/M6P7-2T4R>].

<sup>312</sup> *See In re Arbitration Between: Dubicki Living Tr. v. Merrill Lynch*, No. 02-07575, 2004 WL 433842, at \*1 (N.A.S.D. Feb. 25, 2004).

<sup>313</sup> *See* Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 6:32 AM), <https://twitter.com/chaseacarlson/status/790546495531585537> [<https://perma.cc/L7ZC-C76A>].

<sup>314</sup> *See* Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 6:32 AM), <https://twitter.com/chaseacarlson/status/790546479169564672> [<https://perma.cc/BR8J-ZBF4>].

compromising the terms of its SEC No-Action Letter.<sup>315</sup> All in all, these examples highlight yet another way that the Registration Program—even when it works as designed—can still manage to give players a misleading sense of trust.

### B. *Potentially Damaging Players' Likelihood of Retaining an Ethical, Qualified Financial Advisor*

The primary way that the Registration Program seeks to protect players from fraud is by “ensur[ing] the integrity of”<sup>316</sup>—and providing “access to”—a “qualified group of financial advisors.”<sup>317</sup> But evidence suggests that the Registration Program has perhaps had the opposite effect, potentially damaging players’ likelihood of retaining an ethical, qualified financial advisor.

#### 1. Discomforting Data

In fall 2016, almost a quarter (24 percent) of Registered Advisors reportedly had a disclosure on their FINRA BrokerCheck report,<sup>318</sup> nearly

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<sup>315</sup> Unless, of course, the conduct in question occurred while the Registered Advisor in question was a member of the Registration Program and faced disciplinary proceedings under the Registration Program. See SEC No-Action Letter to NFLPA, *supra* note 17, at \*6 (“The . . . List [of Registered Advisors] will be organized and presented in a manner that does not recommend any [Registered Advisor] over any other [Registered Advisor], other than indicating whether a {Registered Advisor} has been subject to disciplinary action for violating Program regulations. . . . [And t]he NFLPA will not advise players as to the merits or shortcomings of any particular Listed Adviser.” (emphasis added)).

<sup>316</sup> *Id.* at \*20 (“The Program is designed to help ensure the integrity of those who handle a player’s money, not how they invest—or not invest—that money.”).

<sup>317</sup> See REGISTRATION PROGRAM FAQs, *supra* note 98, at 1 (“The principal intent of the [Registration] Program is to benefit the players themselves by providing them access to a qualified group of financial advisors that have met certain eligibility criteria.”).

<sup>318</sup> See Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 5:54 PM), <https://twitter.com/chaseacarlson/status/790718052400848896> [<https://perma.cc/3ZP5-MFBK>] (“Just ran the numbers: at least 24% of the NFLPA advisors were not ‘squeaky clean.’ That is only using Brokercheck, not full background check”); Chase Carlson (@ChaseACarlson), TWITTER (Nov. 18, 2016, 3:25 PM), <https://twitter.com/chaseacarlson/status/799755562347020288> [<https://perma.cc/F2JU-ZSRZ>] (“About 24% of NFLPA Registered Advisors have a black mark [on their record].”) The author reached out and subsequently spoke to Mr. Carlson to better understand his underlying analysis; the author’s understanding is as follows. After receiving the NFLPA’s Registered Advisor list, Mr. Carlson searched for each Registered Advisor

double the 12.7 percent national rate for financial advisors.<sup>319</sup> Notably, disclosures on one's FINRA BrokerCheck report reflect "customer disputes, disciplinary events, and certain criminal and financial matters on the broker's record."<sup>320</sup> So, overall, the frequency with which Registered Advisors'

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on FINRA's BrokerCheck database. Of all the Registered Advisors on the NFLPA's list, roughly 24 percent had a disclosure on their FINRA BrokerCheck record. But this 24 percent figure represented the percentage of Registered Advisors who had a disclosure on their FINRA BrokerCheck record, *not* the percentage of Registered Advisors who were registered as a Broker with FINRA who had a disclosure on their FINRA record. Indeed, there were Registered Advisors on the NFLPA's list who were *not* registered with FINRA. Telephone Interview with Chase Carlson (May 7, 2020). At the time, if one were a registered investment adviser, licensed insurance broker/agent, Certified Public Accountant, or attorney, then he or she did not need to maintain registration with FINRA to become a Registered Advisor with the NFLPA. See 2016 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 67, at 9–10. So, because not all NFLPA Registered Advisors were registered with FINRA at the time of Mr. Carlson's analysis, it should follow that the percentage of those with a disclosure on their FINRA BrokerCheck records would have been even higher than 24 percent had Mr. Carlson limited his analysis to *only* those NFLPA Registered Advisors who were also registered with FINRA. Consider this simplified hypothetical example to illustrate: if there were one hundred NFLPA Registered Advisors when Mr. Carlson conducted his analysis, then twenty-four would have had disclosures on their FINRA BrokerCheck records (24 percent). But if, say, ten of the NFLPA Registered Advisors were lawyers and CPAs—and thus had never registered with FINRA—then, of the one hundred NFLPA Registered Advisors, only ninety would have been registered with FINRA. Yet twenty-four still would have had a disclosure on their BrokerCheck record. Thus, the percentage of FINRA-registered NFLPA Registered Advisors with a disclosure on their BrokerCheck record would be about 27 percent. Telephone Interview with Chase Carlson (May 7, 2020).

<sup>319</sup> See Egan, Matvos & Seru, *supra* note 282, at 233 n.1, 241 n.8 (finding that, from 2005 to 2015, the share of "financial adviser[s]"—whom the authors define as "representatives registered with the Financial Industry Regulatory Authority (FINRA)"—with a disclosure on his or her FINRA BrokerCheck report was 12.7 percent. As explained in note 318, *supra*, Mr. Carlson's 24 percent constituted the percentage of *all* NFLPA Registered Advisors who had a disclosure on their BrokerCheck record, *not* the percentage of FINRA-registered NFLPA Registered Advisors who have a BrokerCheck disclosure. In other words, that NFLPA Registered Advisors were almost twice as likely as the average financial advisor to have a FINRA BrokerCheck disclosure in fall 2016 likely *understates* what would be the true "apples-to-apples" comparison—that is, how much likelier *FINRA-registered NFLPA Registered Advisors* were to have such a disclosure than the average financial advisor.

<sup>320</sup> *About BrokerCheck*, FINRA, <https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/about-brokercheck> [https://perma.cc/Y4DG-QZY2].

BrokerCheck reports included these disclosures suggests that—at least in fall 2016—the Registration Program may have given players access to a group whose integrity and qualifications were collectively worse, *not* better, than those of the general population of financial advisors.

What is more, the number of Registered Advisors in the Registration Program dropped from roughly 500 in May 2010<sup>321</sup> to about 165 in October 2019,<sup>322</sup> representing a decline of about 67 percent. One could devise rationales explaining why the Registration Program’s shrinking roster is not necessarily an inherently negative development—or is perhaps even a positive development. But recall the NFLPA’s No-Action Letter, which the SEC issued based on several key union representations, including that the NFLPA design the Registration Program “to result in a broad cross-section and large number of [Registered Advisors].”<sup>323</sup> Thus, the Registration Program’s contracting size might—by itself—also risk infringing on the No-Action Letter the SEC issued to the NFLPA.

## 2. Sidelined Agents

The Registration Program might also damage players’ likelihood of retaining an ethical, qualified financial advisor by prohibiting Certified Agents from recommending non-Registered financial advisors to their player-clients. Presumably, the NFLPA theorized that this policy would cause Certified Agents who had once referred their player-clients to non-Registered financial advisors to begin referring their player-clients to Registered Advisors instead. In practice, however, this theory hinges on a critical—but perhaps incorrect—assumption: that Certified Agents would sooner recommend a Registered Advisor to their clients than make no financial-advisor recommendation at all.

When journalist Jason Cole contacted fifteen Certified Agents for his investigation into the Registration Program, only four (27 percent) “regularly recommend[ed] financial advisors,” and when they did, they only “recommended advisors they know personally.”<sup>324</sup> One Certified Agent held the Registration Program in such low regard that he counseled his own financial advisor *against* applying to the Registration Program: “I told him it wasn’t

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<sup>321</sup> Robert Margolis, *How the NFL Players Association brought financial advisors to Florida to better marry them to its members*, RIABiz (May 19, 2010), <https://riabiz.com/a/2010/5/19/how-the-nfl-players-association-brought-financial-advisors-to-florida-to-better-marry-them-to-its-members> [https://perma.cc/4ABE-CJMC].

<sup>322</sup> Jessop & Kaplan, *supra* note 1.

<sup>323</sup> SEC No-Action Letter to NFLPA, *supra* note 17, at \*6.

<sup>324</sup> Cole, *supra* note 161.

worth the money he would spend. It's not worth being lumped in with guys who have ripped off players."<sup>325</sup> Other Certified Agents expressed similar sentiments, too, calling the Registration Program "a joke,"<sup>326</sup> "perfunctory," "for (public relations) sake,"<sup>327</sup> an invitation for "potential liability," and "ridiculous"—indeed, as one Certified Agent lamented: "Think about it, based on what the NFLPA is doing, I couldn't recommend Warren Buffet."<sup>328</sup>

This misguided policy creates a situation in which many Certified Agents, despite often being "players' most trusted and important resources and allies,"<sup>329</sup> feel they cannot advise their clients on one of the most consequential decisions of their career: retaining a financial advisor. What is more, this policy seems doubly counterproductive given that, in fall 2016, Registered Advisors proved disproportionately likely to have a disclosure on their FINRA BrokerCheck record.<sup>330</sup> In the end, how could a policy that leaves a player to navigate such circumstances without his Certified Agent *not* damage his chances of retaining an ethical, qualified financial advisor?

### C. *Providing for Insufficient Recovery*

Finally, the Registration Program also fails to ensure that players exploited by a Registered Advisor can recover losses. Section II.C.1 analyzes how the Registration Program's arbitration process provides players with minimal recourse. Section II.C.2 explains how the Registration Program's required minimums for professional liability insurance and fidelity bonding coverage offer insufficient protection. And Section II.C.3 explores how Institutional Registration might help mitigate this issue.

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<sup>325</sup> *Id.*

<sup>326</sup> *Id.* ("[The Registration Program is] a joke. Put it this way, how good a program can it be if Jeff Rubin and Hodge Brahmhatt were registered?").

<sup>327</sup> *Id.* ("[The Registration Program is] *perfunctory*. The union does it for (*public relations*) sake so that they can say they're at least doing something. They don't have the staff to really check out what's going on and they're not following up with who any of these people are." (emphasis added)).

<sup>328</sup> *Id.* ("The program is *ridiculous*. Think about it, based on what the NFLPA is doing, I couldn't recommend Warren Buffet. Instead, we're supposed to tell a player only use someone from the list the union puts out. I'm not taking the *potential liability*." (emphasis added)).

<sup>329</sup> Deubert, Cohen & Fernandez, *supra* note 3, at 242.

<sup>330</sup> See *supra* Section II.B.1.

## 1. Toothless Enforcement: The Code's Arbitration Regime

Though the Code binds Registered Advisors to its “arbitration and disciplinary procedures,”<sup>331</sup> this protection is virtually meaningless for players. This is because the NFLPA’s disciplinary authority vis-à-vis Registered Advisors is limited to either sending them “a letter of reprimand,” or revoking their registration.<sup>332</sup> Thus, even if a Registered Advisor defrauds a player of millions of dollars, the Code’s arbitration process cannot award the player damages. Nor can it prohibit those expelled from the Registration Program from advising other players: because the Registration Program is voluntary, revoking one’s registration does not bar him or her from working with other players.

Beyond failing to make players whole, this toothless enforcement regime suffers at least two other problems. First, because the NFLPA can impose only limited punishments, the threat of NFLPA sanctions offers little deterrence value. If Code violations warranted harsher punishments, perhaps fewer Registered Advisors would violate the Code. Second, for the players who know that the Code does indeed provide for arbitration, the existence of the current inconsequential disciplinary mechanism could be worse than not having any mechanism at all: players can fall into a trap of believing that this built-in arbitration system protects them when, in reality, it does not, representing yet another way the Registration Program can give players a misleading sense of trust.<sup>333</sup>

## 2. Patchy Protection: The Code’s Professional Liability Insurance and Fidelity Bonding Requirements

As outlined above in Section I.B.1, the Registration Program’s eligibility requirements mandate that a Registered Advisor:

[B]e covered by fidelity bonding and professional liability insurance in an amount sufficient to protect against theft and fraud, and also against any errors, omissions, or other conduct by the Financial Advisor which causes financial damage to any Player. The minimum coverage amounts are determined by AUM, as reflected in the chart below.

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<sup>331</sup> See 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 14.

<sup>332</sup> Deubert, Cohen & Fernandez, *supra* note 3, at 277.

<sup>333</sup> See *supra* Section II.A.

Total Assets Under Management	Required Limits: Professional Liability (E&O)	Required Limits: Crime/Fidelity Bond
\$1 Billion+	\$10,000,000 Occurrence/ \$10,000,000 Policy Aggregate	\$10,000,000 Occurrence/ \$10,000,000 Policy Aggregate
\$500,000,000– \$999,999,999	\$5,000,000 Occurrence/ \$5,000,000 Policy Aggregate	\$5,000,000 Occurrence/ \$5,000,000 Policy Aggregate
\$250,000,000– \$499,999,999	\$3,000,000 Occurrence/ \$3,000,000 Policy Aggregate	\$3,000,000 Occurrence/ \$3,000,000 Policy Aggregate
\$0– \$249,999,999	\$2,000,000 Occurrence/ \$2,000,000 Policy Aggregate	\$2,000,000 Occurrence/ \$2,000,000 Policy Aggregate

In order to remain eligible, the [Registered] Financial Advisor must maintain at all times fidelity bonding and professional liability insurance in the amounts determined in accordance with the table [below], and with coverage terms and in a form consistent with industry standards and best practices for firms engaged in activities comparable to [a Registered] Financial Advisor.<sup>334</sup>

To be sure, these coverage minimums do add some value for players. Mandating that Registered Advisors maintain professional liability insurance (often called errors-and-omissions insurance) ensures that players can recover damages (up to the specified amount) if their Registered Advisor is negligent, breaches fiduciary duties, or makes other mistakes.<sup>335</sup> Similarly, requiring Registered Advisors to maintain a fidelity bond ensures that players can recover damages (up to the specified amount) if their Registered Advisor’s employee defrauds or steals from the player (or if their Registered Advisor defrauds or steals from the player and their Registered Advisor is covered by his or her employer’s fidelity bond).<sup>336</sup>

For at least three reasons, however, these insurance requirements insufficiently protect players who suffer losses from an exploitative Registered Advisor. First, professional liability insurance does not cover losses stemming from the fraudulent activity of a Registered Advisor.<sup>337</sup> Indeed, professional liability insurance not only “typically do[es] not cover fines, penalties, and punitive damages” but also “typically exclude[s] . . . claims arising

<sup>334</sup> 2017 NFLPA REGISTERED ADVISORS CODE OF CONDUCT, *supra* note 59, at 8.

<sup>335</sup> See *Do RIAs Need Liability Insurance?*, ADVISOR HUB (Sept. 4, 2019), <https://advisorhub.com/resources/do-riAs-need-liability-insurance> [https://perma.cc/J8WH-PUPC].

<sup>336</sup> James Chen, *Fidelity Bond*, INVESTOPEDIA (Mar. 5, 2020), <https://www.investopedia.com/terms/f/fidelity-bond.asp> [https://perma.cc/3FCP-T977].

<sup>337</sup> Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 6:51 AM), <https://twitter.com/ChaseACarlson/status/790551375683944448> [https://perma.cc/2FTL-R7DQ].

from the advisor's intentional fraud or dishonesty, willful or intentional failure to act prudently, or guarantees made regarding performance, as well as any claims that go beyond the firm's advisory services."<sup>338</sup> And while fidelity bonding covers losses caused by a fraudulent employee, this would presumably apply only if the employer of the predatory Registered Advisor—rather than the Registered Advisor him or herself—purchased the fidelity bond.<sup>339</sup>

Second, most professional liability insurance policies do not cover alternative investments, including investments in “hedge funds, limited partnerships, private equity funds, REITs, exchange-traded notes, derivatives, foreign securities and private placements.”<sup>340</sup> Indeed, “[a]lmost every insurance policy for financial advisors excludes private deals.”<sup>341</sup> Yet it is precisely these private investments “that always get players in trouble.”<sup>342</sup>

Third, even if professional liability insurance or fidelity bonding does apply, the Code's coverage minimums are far too low to sufficiently cover losses commensurate with those suffered under the Registration Program to date. Take the case of Jeff Rubin, who, according to the SEC, violated several fraud-related laws stemming from his role in the Alabama Bingo debacle.<sup>343</sup> As shown in Table 2 below, even if Rubin had maintained professional liability insurance and fidelity bonding coverage at the levels required by today's Code, players would have still incurred massive losses, regardless of Rubin's assets under management.

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<sup>338</sup> *Do RIAs Need Liability Insurance?*, *supra* note 335.

<sup>339</sup> See David T. DiBiase & David J. Billings, “Loss? What Loss?": *Unique Claims on Crime Policies/Fidelity Bonds*, 14 FIDELITY L.J. 271, 271 (2008) (“Fidelity bonds . . . indemnify an insured from loss of or to covered property sustained as a direct result of ‘theft’ of ‘employee dishonesty.’ . . . Indemnity is available only for covered losses resulting directly from the dishonesty of the insured's employee.”).

<sup>340</sup> See *Do RIAs Need Liability Insurance?*, *supra* note 335.

<sup>341</sup> Chase Carlson (@ChaseACarlson), TWITTER (Oct. 24, 2016, 7:00 AM), <https://twitter.com/ChaseACarlson/status/790553536673280000> [https://perma.cc/T4EL-6QKZ].

<sup>342</sup> *Id.*

<sup>343</sup> The SEC specifically found that Rubin “willfully violated” (i) “Sections 17(a)(1) and 17(a)(3) of the Securities Act, which prohibits fraudulent conduct in the offer or sale of securities,” (ii) “Section 206(1) of the Advisers Act, which prohibits any investment adviser from employing any device, scheme, or artifice to defraud any client or prospective client,” and (iii) “Section 206(2) of the Advisers Act, which prohibits an investment adviser from, directly or indirectly, engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.” See Jeffrey B. Rubin, Respondent., Exchange Act Release No. 4196, 2015 WL 5352653 (Sept. 15, 2015).

TABLE 2<sup>344</sup>

Total Assets Under Management	Coverage from Professional Liability Insurance/ Fidelity Bonding	Player Losses <sup>345</sup>	Losses Not Recoverable from Professional Liability Insurance/ Fidelity Bonding	Percentage of Losses Recoverable from Professional Liability Insurance/ Fidelity Bonding
\$1B	\$10M	\$43M	\$33M	23%
\$500M–\$999M	\$5M	\$43M	\$38M	12%
\$250M–\$499M	\$3M	\$43M	\$40M	7%
\$0–\$249M	\$2M	\$43M	\$41M	5%

In fact, even if Rubin had managed over \$1 billion in assets, his player-clients would have recovered just twenty-three cents on the dollar from either the Registration Program’s mandated professional liability insurance or its fidelity bonding coverage. The much likelier scenario, however, is that Rubin had fewer than \$250 million under management: although Pro Sports Financial (Rubin’s company) had upwards of 100 clients at its peak,<sup>346</sup> given that many of these clients were NFL players, a group for whom “median career earnings . . . are about \$3 million,”<sup>347</sup> it seems improbable that the firm managed \$25 million per client, on average. It stands to reason, therefore, that Rubin’s clients almost certainly would have recovered just five cents on the dollar from either of the Registration Program’s minimum professional liability insurance or fidelity bonding coverage.<sup>348</sup>

<sup>344</sup> For information about the assumptions underlying Table 2, see *infra* note 348.

<sup>345</sup> Forty-three million dollars lost among NFL players reflects the amount reported by *60 Minutes*. See Keteyian, *supra* note 167 (“Several of the NFL’s biggest stars have lost a total of \$43 million in a risky venture brought to them by a financial adviser registered by their own union.”).

<sup>346</sup> See Cole & Getlin, *supra* note 172 (“Former Pro Sports Financial vice president Mike McIntyre said the company represented more than 100 clients at its peak.”).

<sup>347</sup> Stan Jastrzebski, *NFL players are having trouble making their million dollar salaries last into retirement*, BUSINESS INSIDER (Sept. 5, 2017), <https://www.businessinsider.com/nfl-players-having-trouble-making-salaries-last-into-retirement-2017-9> [<https://perma.cc/WL2P-F6FJ>].

<sup>348</sup> This conclusion (and Table 2) assumes, *arguendo*, that either professional liability insurance or a fidelity bond would have applied in this case. But it is quite

On the whole, then, the Code's required professional liability insurance and fidelity bonding coverage, like its arbitration mechanism, not only fails to protect players adequately, but can also give players a misleading sense of trust.<sup>349</sup>

### 3. Institutional Registration and Recovery

All that said, the recent expansion of the Registration Program to include Registered Firms could improve players' chances of recovering losses from fraud, assuming it causes them to retain Registered Firms over Registered Advisors at small and medium-sized firms. This is because the NFLPA seems focused on registering large, name-brand banks, as evidenced by their initial registration of Goldman Sachs and Bessemer Trust, who boast \$1.77 trillion (\$198 billion in private wealth management alone) and \$105 billion in assets under management, respectively.<sup>350</sup>

Admittedly, there are excellent financial advisors at boutique firms, and poor financial advisors at large, name-brand institutions. From a fraud-protection standpoint, however, all else equal, it is safest to retain a financial advisor at a large institution. Why? Because a defrauded client can file a

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possible neither would have applied. Indeed, professional liability insurance likely would not have applied because the Alabama electronic-bingo project was a private investment, and, as explained, professional liability insurance seldom covers losses stemming from private investments. A second, independently sufficient reason that professional liability insurance may not have applied here is because the SEC found Rubin to have violated several fraud-related laws stemming from his role in the Alabama electronic-Bingo project (*see supra* note 343), and, as explained, professional liability insurance seldom covers losses caused by fraud. Finally, because Rubin owned his own firm (as established in Section II.C.3, *infra*), he may not have been considered an "employee" for the purposes of fidelity bonding. In any event, it seems implausible that professional liability insurance and fidelity bonding coverage would have *both* applied. Thus, Table 2 above shows what the losses would have been if just one of these two policy types applied. Again, to reiterate, because these insurance requirements were not in effect at the time, this merely represents an *illustrative* hypothetical.

<sup>349</sup> *See supra* Section II.A.

<sup>350</sup> Becca Stanek, *Goldman Sachs Private Wealth Management Review*, SMARTASSET (Oct. 21, 2019), <https://smartasset.com/financial-advisor/goldman-sachs-private-wealth-management-freview> [<https://perma.cc/NH8W-JBR7>] ("[Goldman Sachs's] investment management division . . . oversees about \$1.77 trillion for clients. Goldman Sachs Private Wealth Management, which has offices across the U.S., currently has \$198 billion in assets under management."); *Bessemer Group Inc.*, GURUFOCUS, <https://www.gurufocus.com/guru/bessemer+groupnc/profile> [<https://perma.cc/FQ29-U3RC>] ("[Bessemer] now oversees over \$105 billion in total assets under management for over 2,300 clients.").

lawsuit or FINRA customer complaint against a well-capitalized institution without risk of a judgment-proof defendant. As Mr. Carlson explained in a quote for *The Athletic Report*: “[Institutional registration] can solve one issue, which is, in the past, there’s been some [Registered Advisors] who . . . ripped off players, and there was no money to recover. By only registering . . . really large firms, there will be money [to recover], if someone makes a mistake.”<sup>351</sup> To illustrate, compare the fate of Jeff Rubin’s clients—for whom recovery was “nearly impossible” because Rubin owned his own small firm<sup>352</sup>—with the fate of two of Aaron Parthemer’s clients, former NFL players Asante Samuel and John St. Clair. Because Parthemer worked at one of the largest and most well-resourced financial institutions in the world, Morgan Stanley, Samuel and St. Clair were able to recover their losses—collectively more than \$1 million—at FINRA arbitration proceedings.<sup>353</sup>

### III. CONCLUSION

Admittedly, only time will tell how the Registration Program fares moving forward. This is especially true given the Program’s recent expansion to include Registered Firms and its upcoming November 2020 cutoff date for all Registered Advisors to become a Certified Financial Planner or Chartered Financial Analyst. All things considered, however, the NFLPA’s Registration Program—though undoubtedly well-intentioned—seems counterproductive overall.<sup>354</sup>

Indeed, the discussion above highlighted three main ways the Registration Program has failed to protect players. First, the Registration Program

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<sup>351</sup> Jessop & Kaplan, *supra* note 1.

<sup>352</sup> See Carlson, *supra* note 171 (“Rubin, . . . owned [his] own firm, making it nearly impossible for [his player-clients] to recover money after the downfall.”).

<sup>353</sup> See Ashley Portero, *Mega Millions winner, former NFL player win \$4.2M arbitration from Morgan Stanley*, SOUTH FLA. BUS. J. (Dec. 31, 2018), <https://www.bizjournals.com/southflorida/news/2018/12/31/mega-millions-winner-former-nfl-player-win-4-2m.html>.

<sup>354</sup> Even so, reasonable minds can—and, indeed, have—disagreed with this conclusion. See, e.g., Deubert, Cohen & Fernandez, *supra* note 3, at 278 (concluding that even though “the NFLPA financial advisor registration system does not guarantee a player will receive sound financial advice and assistance, it increases the odds as compared to non-registered financial advisors”); SHROPSHIRE, DAVIS & DURU, *supra* note 185, at 79 (concluding that the Registration Program and the Code “are certainly steps in the right direction” and reasoning that “given . . . no other major American sports league’s players’ union has to date established such a program, the NFLPA . . . [should] be applauded” for its efforts).

can give players a misleading sense of trust in a number of ways.<sup>355</sup> Players naturally understand a Registered Advisor's inclusion in the Registration Program as an endorsement from their trusted union, even though this is not the case.<sup>356</sup> In addition, players, among many others—including Certified Agents, academics, and other industry experts—conflate the NFLPA's Registration Program with its Certification Program, despite the former lacking the protections provided by the latter.<sup>357</sup> Further, the Registration Program enables Registered Advisors to mislead players by “credentializing”—that is, exaggerating—their affiliation with the NFLPA,<sup>358</sup> often on their firm's websites<sup>359</sup> or publicly available LinkedIn profiles.<sup>360</sup> Finally, and perhaps most troubling, the Registration Program has repeatedly failed not only to ensure that Registered Advisors (and applicants) meet<sup>361</sup> and maintain<sup>362</sup> compliance with the Registration Program's minimum requirements, but also to inform players when Registered Advisors' background checks turn up *non-disqualifying* red flags.<sup>363</sup>

Second, the Registration Program might not improve—and indeed, may even damage—players' likelihood of retaining an ethical, qualified financial advisor.<sup>364</sup> Indeed, available data, though limited and slightly dated, suggests that Registered Advisors are nearly twice as likely to have a disclosure on their FINRA BrokerCheck record than the average financial advisor nationwide.<sup>365</sup> What is more, the size of the Registration Program has reportedly decreased from about 500 Registered Advisors in 2010 to about 165 in 2019—almost a 67 percent drop in less than a decade.<sup>366</sup> Lastly, because some Certified Agents do not have a Registered Advisor whom they feel comfortable recommending to their player-clients, and because the NFLPA prohibits Certified Agents from recommending non-Registered financial advisors, some Certified Agents simply decide to make no recommendation at all to their player-clients, leaving players-clients alone to make one of the biggest decisions of their career: retaining a financial advisor.<sup>367</sup>

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<sup>355</sup> See *supra* Section II.A.

<sup>356</sup> See *supra* Section II.A.1.

<sup>357</sup> See *supra* Section II.A.2.

<sup>358</sup> See *supra* Section II.A.3.

<sup>359</sup> See *supra* Section II.A.3.a.

<sup>360</sup> See *supra* Section II.A.3.b.

<sup>361</sup> See *supra* Section II.A.4.a.

<sup>362</sup> See *supra* Section II.A.4.b.

<sup>363</sup> See *supra* Section II.A.4.c.

<sup>364</sup> See *supra* Section II.B.

<sup>365</sup> See *supra* Section II.B.1.

<sup>366</sup> See *supra* Section II.B.1.

<sup>367</sup> See *supra* Section II.B.2.

Third, the Registration Program fails to ensure that players exploited by a Registered Advisor can recover losses.<sup>368</sup> Because the Registration Program's arbitration mechanism does not provide for monetary awards, it is virtually meaningless to defrauded players, lacks deterrence value, and fosters a misleading sense of trust.<sup>369</sup> And the Registration Program's minimum professional liability insurance and fidelity bonding coverage, though better than nothing, may not cover a player's losses if the Registered Advisor commits fraud or if the loss stems from an alternative investment (such as a private deal), two of professional athletes' biggest sources of investment loss.<sup>370</sup> And even if a Registered Advisor's professional liability insurance or fidelity bonding coverage does apply, the minimum required coverage under the Code is insufficient to cover losses of the magnitude that have been suffered under the Registration Program to date.<sup>371</sup> That said, if the recent expansion of the Registration Program to include Registered Firms leads players to retain Registered Firms over Registered Advisors at small and medium-sized firms, then this development could improve players' chances of recovering losses from fraud; this is because the NFLPA seems intent on registering large institutions that are well-resourced and thus less likely to become a judgment-proof defendant.<sup>372</sup>

All in all, it is clear that the NFLPA simply seeks to help its player-members achieve and maintain financial security. But if the union is going to meet this lofty aspiration, then the NFLPA needs to find a better solution than the current version of the Registration Program.

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<sup>368</sup> See *supra* Section II.C.

<sup>369</sup> See *supra* Section II.C.1.

<sup>370</sup> See *supra* Section II.C.2.

<sup>371</sup> See *supra* Section II.C.2.

<sup>372</sup> See *supra* Section II.C.3.

